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MEMORANDUM TO: Faryar Shirzad

Assistant Secretary for Import Administration

FROM: Joseph A. Spetrini

Deputy Assistant Secretary

AD/CVD Enforcement Group III

SUBJECT: Issues and Decision Memorandum for the 2000-2001 Administrative

Review of Stainless Steel Sheet and Strip in Coils from Mexico; Final

Results of Antidumping Duty Administrative Review

Summary

We have analyzed the case and rebuttal briefs of the interested parties in the 2000-2001 administrative review of the antidumping duty order on stainless steel sheet and strip in coils (S4) from Mexico (A-201-822). As a result of our analysis, we have made changes to the margin calculation as discussed below. We recommend that you approve the positions that we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this administrative review on which we received comments and rebuttal comments from parties:

Adjustments to Normal Value

Comment 1. Circumstances of Sale Adjustment to Normal Value

Comment 2: Home Market Indirect Selling Expenses

Comment 3: Level-of-Trade Adjustment

Adjustments to United States Price

Comment 4: CEP Profit

Comment 5: Duty Drawback

Comment 6: U.S. Indirect Selling Expenses

Comment 7: Additional Mexinox USA Expenses

Comment 8: Calculation of the U.S. Interest Rate

Comment 9: Inventory Carrying Costs

Cost of Production

Comment 10: Interest Expenses

Comment 11: General & Administrative Expenses

Comment 12: Whether to Include Services Supplied by Mexinox USA in Material Costs

Comment 13: Scrap Recovery Values

Further Manufacturing

Comment 14: Value-Added Costs by Ken-Mac

Assessment Rates

Comment 15: Assessment Rate Methodology

Margin Calculations

Comment 16: Treatment of Non-Dumped Sales

Background

On August 7, 2002, we published in the <u>Federal Register</u> the preliminary results of the administrative review of stainless steel sheet and strip in coils from Mexico for the period July 1, 2000 through June 30, 2001. <u>See Stainless Steel Sheet and Strip in Coils from Mexico; Preliminary Results of Antidumping Duty Administrative Review, 67 FR 51204 (<u>Preliminary Results</u>).</u>

This review covers one manufacturer/exporter of stainless steel sheet and strip in coils, ThyssenKrupp Mexinox S.A. de C.V. (Mexinox). We invited parties to comment on our preliminary results of review. We received case briefs from the respondent, Mexinox, and from Allegheny Ludlum, AK Steel Corporation, J&L Specialty Steel, Inc., Butler-Armco Independent Union, Zanesville Armco Independent Union, and the United Steelworkers of America, AFL-CIO/CLC (collectively, petitioners) on September 12, 2002. We received rebuttal briefs from petitioners on September 20, 2002 and from Mexinox on September 23, 2002.

Discussion of the Issues

Adjustments to Normal Value

Comment 1: Circumstances of Sale Adjustment to Normal Value

In accordance with section 773(a)(7)(B) of the Tariff Act, Mexinox states the Department granted a constructed export price (CEP) offset to normal value (NV) in the preliminary results. However, Mexinox notes, the Department limited the CEP offset to the amount of indirect selling expenses (ISEs) and inventory carrying costs (ICCs) deducted from CEP. While the "CEP offset cap" is permitted by the statute, Mexinox contends, it precludes the Department from making a fair comparison between U.S. price (USP) and NV. Respondent's Case Brief at 15. Mexinox asserts both U.S. and international law require a fair comparison between USP and NV, citing Smith-Corona Group v. United States, 713 F.2d 1568, 1578 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984), Consumer Prod. Div., SCM Corp. v. Silver Reed America, Inc., 753 F.2d 1033, 1039-40 (Fed. Cir. 1985), and

the World Trade Organization (WTO) <u>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Antidumping Agreement)</u> at Article 2.4. Mexinox claims the Department can still account for the differences affecting price comparability by making an additional adjustment for ISEs and ICCs beyond the amount of the CEP offset. Mexinox argues such a circumstance of sale adjustment is lawful under section 773(a)(6)(C)(iii) of the Tariff Act, and requests that the Department make this adjustment for these final results.

Mexinox cites Article 2.4 of the WTO <u>Antidumping Agreement</u>, which mandates that "[d]ue allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, <u>levels of trade</u>, quantities, physical characteristics, and <u>any other differences which are also demonstrated to affect price comparability</u>" (respondent's emphasis). With respect to CEP sales, Mexinox states Article 2.4 specifically provides that if "price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph." Mexinox maintains the WTO <u>Antidumping Agreement</u> does not put a cap on the amount of the adjustments that must be made to NV to make it comparable to CEP. Thus, Mexinox contends the <u>Antidumping Agreement</u> establishes that the Department must adjust for all LOT-related differences between home market and U.S. market sales that affect comparability.

Mexinox argues that the Department can adhere to the Antidumping Agreement and simultaneously conduct a "fair comparison" under U.S. law by allowing an additional adjustment for all ISEs and ICCs above the CEP offset cap. Pursuant to section 773(a)(6)(C)(iii) of the Tariff Act, Mexinox states, NV "shall be . . . increased or decreased by the amount of any difference (or lack thereof) between export price or constructed export price and [NV] (other than a difference for which allowance is otherwise provided under this section) that is established to the satisfaction of the administering authority to be wholly or partly due to . . . differences in the circumstances of sale." Respondent's Case Brief at 16. Mexinox asserts that allowing such an adjustment is upheld by the Department's practice and Court of International Trade (CIT) case law. Mexinox cites The Budd Co., Wheel & Brake Div. v. United States, 14 CIT 595, 746 F. Supp. 1093, 1100 (1990) (Budd Co.), in which the Department granted a circumstance of sale adjustment to NV to account for distortions caused by hyperinflation in the Brazilian economy between the date of sale and date of shipment. According to Mexinox, the petitioners in that case argued the Department had subverted the applicable currency conversion regulations. Upon appeal, Mexinox contends, the CIT not only sustained the Department's use of the circumstance of sale adjustment as a valid exercise of discretion, but also stated that "... to the extent the circumstances of sale adjustment conflicted with the currency conversion regulations, it was appropriate for Commerce to choose to effectuate the primary statutory purpose in favor of fair determinations based on contemporaneous comparisons." Respondent's Case Brief at 17, citing Budd Co. at 1100. Although that decision was made prior to implementation of the Uruguay Round Agreements Act (URAA), Mexinox states, the continuity in the statute regarding circumstances of sale adjustments renders it applicable to the instant review. Mexinox also cites Viraj Group, Ltd. v. United States, Slip Op. 01-104, 2001 WL 929756, *6 (CIT 2001) (Virai), in which the CIT referred to Budd <u>Co</u>. as an example of the discretion available to the Department. According to Mexinox, the CIT remanded <u>Viraj</u> to the Department because its mechanical application of the exchange rate methodology was contrary to the goal of the antidumping laws to calculate as accurate a margin as possible. Mexinox holds these cases clearly show that, even under U.S. law, "it is the Department's first and most important obligation to establish comparability between the U.S. price and NV." Respondent's Case Brief at 18. Thus, Mexinox argues, where ordinary application of the trade law causes distortion, the Department should employ the circumstance of sale provision.

While the Department typically limits circumstance of sale adjustments to direct expenses, Mexinox claims, the Department argued in <u>Budd Co.</u> that it was not required to limit such adjustments to direct expenses. Mexinox notes the Department stated in <u>Budd Co.</u> at 1101 that "...we are not precluded from using this provision to achieve a result that reflects economic reality and is consistent with the basis purpose of the Act. . . . to fairly compare foreign market value and United States price on an equivalent basis." Referring to <u>Stainless Steel Sheet and Strip in Coils from Mexico</u>; Final Results of Antidumping <u>Duty Administrative Review</u>, 67 FR 6490, 6492 (February 12, 2002) (<u>1999-2000 Final Results</u>) and the accompanying Issues and Decision Memorandum (Decision Memorandum) at Comment 2, Mexinox states the Department denied a circumstance of sale adjustment in that review on the grounds the expenses were not direct expenses. However, Mexinox asserts, the reasoning in <u>Budd Co.</u> shows this concern does not prevent the Department from granting such a circumstance of sale adjustment in the instant review. For these final results, Mexinox submits the Department should allow an additional circumstance of sale adjustment to NV in order to make the fair comparison required by U.S. and international law.

Petitioners respond that this issue is a repetition of the argument raised by Mexinox and addressed by the Department in the 1999-2000 Final Results. Petitioners urge the Department to dismiss this argument as it did in that review.

Department's Position: We disagree with Mexinox that the CEP offset cap has precluded us from making a fair comparison between NV and USP. Section 773(a)(7)(B) of the Tariff Act establishes that in making a CEP offset adjustment, the Department will reduce NV "by the amount of indirect selling expenses incurred in the country in which normal value is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made under section 772(d)(1)(D)" (emphasis added). Similarly, section 351.412(f) of the Department's regulations provides that "[t]he amount of the constructed export price offset will be the amount of indirect selling expenses included in normal value, up to the amount of indirect selling expenses deducted in determining constructed export price." Thus, neither the statute nor our regulations provides for an adjustment for indirect expenses beyond those deducted from CEP.

We also disagree with Mexinox that we should make an additional circumstance of sale adjustment to account for the amount of ISEs and ICCs beyond the CEP offset cap. Section 351.410 of the

Department's regulations provides clarification regarding the granting of circumstance of sale adjustments to NV. Specifically, section 351.410(b) states:

With the exception of the allowance described in paragraph (e) of this section concerning commissions paid only in one market, the Secretary will make circumstances of sale adjustments under section 773(a)(6)(C)(iii) of the Act only for direct selling expenses and assumed expenses.

As defined in section 351.410(c) of the Department's regulations, direct selling expenses consist of expenses "such as commissions, credit expenses, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question." Section 351.410(d), in turn, defines assumed expenses as "selling expenses that are assumed by the seller on behalf of the buyer, such as advertising expenses." The Department treats all other selling expenses as indirect expenses unless the respondent establishes that the expense in question is direct in nature. See, e.g., RHP Bearings v. United States, 875 F. Supp. 854, 859 (CIT 1995). ISEs and ICCs are, by their very nature, indirect expenses; they are incurred regardless of whether a sale is made. We note that Mexinox's reference to Budd Co. is inapposite because that case reflected a specific set of circumstances that warranted an adjustment to account for hyperinflation. Unlike the facts in Budd Co., during the POR the Mexican economy was not inflationary and Mexinox has failed to establish that it is entitled to a circumstance of sale adjustment equivalent to the one granted in Budd Co. Therefore, we have not made an additional circumstance of sale adjustment to NV for these final results to account for indirect expenses beyond the amount of the CEP offset cap.

With respect to Mexinox's reference to the WTO <u>Antidumping Agreement</u>, we note that this antidumping duty administrative review is being conducted under the domestic laws of the United States, which are fully consistent with international obligations. Therefore, we find that our methodology results in a fair comparison between USP and NV.

Comment 2: Home Market Indirect Selling Expenses

Petitioners state Mexinox revised its home market ISE ratio in its May 8, 2002 supplemental questionnaire response (SQR) at Attachment B-44, but did not explain why it made this revision. Petitioners contend the revision seems to stem from a "reduction in the offset for 'salaries paid by Mexinox on behalf of subsidiaries." Petitioners' Case Brief at 20, citing Mexinox's May 8, 2002 SQR at Attachment B-44. Petitioners assert the Department should not use the revised ratio but rather should apply the ratio reported in Mexinox's November 7, 2001 questionnaire response (QR) at Attachment B-17.

Mexinox rebuts that it has properly reported its home market ISEs and contends the Department should dismiss petitioners' argument. First, Mexinox argues, petitioners are wrong in stating it did not

explain the revision made to the ISE ratio. Citing S1-62 of its May 8, 2002 SQR, Mexinox notes it made this revision "to correct for errors identified in the original submission." In fact, Mexinox asserts, petitioners themselves correctly noted in their Case Brief that the numerator of the ISE ratio was amended to reflect a decrease in the offset for salaries paid by Mexinox on behalf of subsidiaries. According to Mexinox, the error arose from an incorrect formula in the electronic worksheet used to compute the ISE ratio. Mexinox contends it corrected that error and provided an explanation of the correction at the earliest opportunity — in its first supplemental questionnaire response. Respondent's Case Brief at 46. Noting it filed additional supplemental questionnaire responses on June 3, 2002 and July 17, 2002, Mexinox holds that petitioners should have addressed any concerns regarding its explanation during the intervening ten weeks. Mexinox argues it is not appropriate for petitioners to question this revision after the Department's preliminary determination. Further, Mexinox argues, petitioners have neglected to point to any record information that casts doubt on the accuracy or appropriateness of this revision. Mexinox asserts that it certified the accuracy of this information and that this information was subject to verification. Respondent's Case Brief at 46.

Department's Position: We disagree with petitioners. Based on a comparison of Attachment B-17 with Attachment B-44, it is clear that Mexinox revised its home market ISEs to exclude salaries paid by Mexinox on behalf of subsidiaries. Such expenses would be included in the selling expenses of Mexinox's subsidiaries and thus are properly excluded from Mexinox's selling expenses. Because petitioners have provided no valid reason for disregarding this revision, we have used the revised home market ISE ratio reported in Mexinox's May 8, 2002 SQR for these final results.

Comment 3: Level-of-Trade Adjustment

Citing Mexinox's May 8, 2002 SQR at S1-19-22 and Attachment A-21, petitioners state that Mexinox has claimed its home market sales are made at a different and more advanced level of trade (LOT) than its U.S. sales. While the Department concluded this claim was upheld by the record in past proceedings of this case, petitioners assert the Department should determine there are no significant LOT differences in the home or U.S. markets.

Petitioners argue that Mexinox's analysis of LOT differences both within the home market and between the Mexican and U.S. markets is founded upon an exaggerated and very subjective analysis of selling activities. Petitioners state Mexinox has depicted the selling process for a rather simple commodity product as one encompassing 16 different activities that "predictably ... are described as being most intense in the home market." Petitioners' Case Brief at 4. Petitioners claim the credibility of Mexinox's analysis is lessened by the fact that several of these selling activities relate to movement and selling expenses or to physical differences in merchandise that have already been considered in determining net prices or in making product comparisons. In addition, petitioners contend, Mexinox has suggested its staff in San Luis Potosi (SLP) does virtually nothing to serve the U.S. market and exists solely to serve home market customers, pointing to Attachment A-21 of Mexinox's May 8, 2002 SQR. Petitioners assert the arbitrary nature of Mexinox's LOT distinctions show that no significant

LOT differences exist, either within the home market or between the Mexican and U.S. markets. Petitioners' Case Brief at 5. Therefore, petitioners urge the Department to reexamine this issue in the context of the instant review and determine there are no significant LOT differences, either within or between the relevant markets. Id.

Alternatively, petitioners maintain, if the Department continues to determine there were differences in the levels of selling activities, the Department should <u>not</u> conclude that (1) Mexinox performed basically the same selling functions for all sales to home market customers and that there is only one LOT in the home market, and (2) the home market LOT is more advanced than the LOT of Mexinox's "constructed EP" sales. Petitioners' Case Brief at 5. If the record provides any evidence of credible LOT distinctions, petitioners assert, these distinctions support the conclusion that there are two LOTs in the home market.

Petitioners argue that Mexinox reported a single home market LOT that was more advanced than the U.S. LOT in order to bolster its claim for a CEP offset adjustment. Citing Mexinox's November 7, 2001 QR at B-25, petitioners contend that Mexinox presented the CEP offset as a "veritable fait accompli." Petitioners' Case Brief at 5. According to petitioners, Mexinox's claim that all home market customers represent a single LOT "is a strategic 'blurring of lines' that serves Mexinox." Id. at 6. Based on Mexinox's reported selling activities, petitioners maintain all of Mexinox's home market sales could not have been made at the same LOT. Despite Mexinox's claim that all home market sales occurred at a more remote point in the distribution chain, petitioners argue that selling functions would have been far less intensive for sales to home market affiliated customers, particularly Mexinox Trading, an affiliated distributor also based in SLP, citing Mexinox's October 12, 2001 QR at A-14.

Even if the Department finds some of Mexinox's home market sales were at a more remote LOT than its sales to Mexinox USA (Mexinox's affiliated reseller in the United States), petitioners assert the Department must determine that sales to Mexinox Trading and Mexinox USA were at the same LOT. Referring to Mexinox's May 8, 2002 SQR at Attachment A-21, petitioners maintain that the selling functions performed in relation to Mexinox's sales to Mexinox Trading should be similar to those performed in relation to sales to Mexinox USA. Citing S1-21 of Mexinox's May 8, 2002 SQR, petitioners state Mexinox has categorized sales between itself and Mexinox USA as "routine related-company transfers." Petitioners aver it would be irrational to find Mexinox's sales to Mexinox Trading to be any less routine. Petitioners' Case Brief at 6.

Petitioners state Mexinox has not provided a list of selling activities specifically for its sales to Mexinox Trading, but has provided selling activities for home market inventory sales to distributor/retailer customers. Attributing these activities to Mexinox Trading, petitioners create the following selling activities chart based on Attachment A-21 of Mexinox's May 8, 2002 SQR:

Selling Function Mexinox Trading Mexinox USA

1. Pre-Sale Technical Assistance		Medium		No
2. Sample Analysis		Medium		No
3. Prototypes and Trial Lots		Low		No
4. Continuous Technical Service		Medium		No
5. Price Negotiations/Customer Communication	ons	Medium		No
6. Process Customer Orders		High		Low
7. Inventory/Just-in-time		High/No		No/No
8. Freight/Delivery		High		Low
9. Sales Calls		High		No
10. International Travel		No		No
11. Further Processing	High		Low	
12. Credit/Collection		High		No
13. Currency Risks		High		No
14. Warranty services		Medium		No
15. Low Volume		High		Low
16. Small Packages		High		Low

With respect to the first four activities, petitioners argue Mexinox could have reported these in the technical services expense field, but did not do so, stating such expenses are not easy to pinpoint. Even if some customers received technical service, petitioners maintain, it is doubtful the level of service provided to Mexinox Trading and Mexinox USA would have differed substantially. Similarly, petitioners contend it is difficult to imagine significant differences between the levels of price negotiations/customer communications, processing of customer orders, sales calls, credit/collection, currency risks, inventory, freight, and warranty services provided to Mexinox Trading and Mexinox USA. Even if these activities were more advanced in the home market overall, petitioners hold, they would be identical or nearly identical for upstream transactions to affiliates, regardless of whether the affiliate was located in SLP or in the United States. Petitioners' Case Brief at 7-8. Likewise, petitioners assert it is improbable that the level of inventory, freight, and warranty services varied between Mexinox Trading and Mexinox USA. Petitioners allege that arranging delivery to Mexican and U.S. warehouses should not involve immensely different activities, and warranty services likely are provided to the downstream customer rather than to the affiliate. Further, petitioners contend, any differences related to inventory, freight, and warranty services are already accounted for in the reported expenses. Regarding "just-in-time" inventory services and international travel, petitioners point out there are no differences between the level of activity provided to Mexinox Trading and Mexinox USA. With respect to further processing and small packages, petitioners argue these relate entirely to the physical characteristics of the merchandise, and should not be considered as selling-related functions or activities. Petitioners state the Department always seeks to compare identical merchandise and performs difference-in-merchandise (difmer) adjustments where necessary. Finally, petitioners aver the function "low-volume orders" is also somewhat related to physical characteristics, giving the example that narrow-width strip orders are typically low-volume. Id. at 8. Petitioners argue any such

differences would be accounted for separately under section 351.409 of the Department's regulations. Even if there was a quantity difference between sales to Mexinox Trading and Mexinox USA, petitioners hold, it would not call for finding different LOTs.

Based on this analysis, petitioners assert the selling activities chart for Mexinox Trading and Mexinox USA can be amended to read as follows:

Selling Function		Mexinox Trading	Mexinox USA
1. Pre-Sale Technical Assistance (on upstream transactions)	No	No	
2. Sample Analysis (on upstream transactions)	No	No	
3. Prototypes and Trial Lots (on upstream transactions)		No	No
4. Continuous Technical Service (on upstream transactions)	No	No	
5. Price Negotiations/Customer Communications		No	No
(on upstream transactions)			
6. Process Customer Orders (on upstream transactions)		Low	Low
7. Inventory/Just-in-time (on upstream transactions)		High/No	No/No
8. Freight/Delivery (on upstream transactions)	Low	Low	7
9. Sales Calls (on upstream transactions)		No	No
10. International Travel (on upstream transactions)		No	No
11. Further Processing			
12. Credit/Collection (on upstream transactions)		No	No
13. Currency Risks (on upstream transactions)	No	No	
14. Warranty services (on upstream transactions)		No	No
15. Low Volume			
16. Small Packages			_

Petitioners claim the revised selling functions chart more accurately represents the selling activities performed by Mexinox in relation to its two affiliated distributors, properly omitting any functions carried out on behalf of the distributors' downstream customers or any functions related to physical characteristics. Petitioners cite section 351.412(c)(2) of the Department's regulations, which states that "{s}ubstantial differences in selling activities are a necessary . . . condition for determining that there is a difference in the stage of marketing." To the degree there may be some differences for sales to Mexinox Trading and Mexinox USA, petitioners contend the above analysis demonstrates the differences are obviously not substantial. Asserting the record contains no credible evidence that Mexinox's sales to Mexinox Trading were at a more advanced LOT than its sales to Mexinox USA, petitioners state that if the Department finds any differences in LOT, it should not accept Mexinox's argument that there is a single home market LOT. Petitioners state there are two home market LOTs, one of which is clearly no more advanced than the LOT of Mexinox's "constructed EP" sales.

Referring to the Antidumping Questionnaire at I-3, petitioners state it is well established that the Department compares U.S. and home market sales at the same LOT whenever possible. Citing section 351.412(f) of the Department's regulations, petitioners note a CEP offset is allowed only if comparisons cannot be made at the same LOT, and comparisons at a different LOT are found to have an effect on price comparability and no LOT adjustment is possible.

Petitioners contend that when matching criteria show sales to Mexinox Trading and sales to Mexinox USA are the best comparison, the Department must compare those sales before comparing U.S. sales to home market sales at a different LOT. To the extent it is necessary to compare U.S. sales to home market sales at a different LOT, petitioners claim the record provides evidence that price comparability is affected and that an LOT adjustment is possible. Petitioners' Case Brief at 10. Petitioners cite section 351.412(e) of the Department's regulations, which directs the Department to make LOT adjustments by calculating the weighted-averages of the prices of the home market sales at the two different LOTs, computing the average difference between the two weighted-averages, and then applying the difference to NV. In this case, petitioners note, the LOT adjustment would be applied to home market sales that were at a different LOT from the LOT of sales to Mexinox Trading.

Petitioners assert the Department has already determined this LOT adjustment in performing the arm's-length test. According to petitioners, the arm's-length test program used in the preliminary results shows that weighted-average prices to Mexinox Trading varied by a certain percentage ¹ from weighted-average prices to unaffiliated home market customers. Therefore, petitioners argue, the arm's-length test ratio for Mexinox Trading is the appropriate LOT adjustment factor. Petitioners state the Department can compute the LOT adjustment by multiplying NV by the arm's-length test ratio for Mexinox Trading. Petitioners note this calculation could result in either an upward or downward adjustment. In this particular case, petitioners maintain, the Department must interpret the results of this calculation as evidence that the difference in LOTs does not affect price comparability. If the Department makes this conclusion, petitioners contend it must refuse to make a CEP offset even if it concludes that no LOT adjustment is appropriate, citing section 351.412(f)(3) of the Department's regulations.

In its rebuttal brief at page 8, Mexinox notes the Department found in its preliminary results that only one LOT existed in the home market. Since the Department found this LOT to be more advanced than the CEP LOT, Mexinox states, the Department granted a CEP offset. Mexinox contends these findings are consistent with the Department's findings in both the original investigation and in the 1999-2000 Final Results. Stating that neither the facts nor the law have changed, Mexinox asserts it is the Department's practice to follow prior determinations and cites several cases including Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review: Gray Portland Cement and

¹ References herein to "a certain percentage," "a certain figure," or "a certain rate" entail business proprietary information which may not be disclosed in this public document.

<u>Clinker From Mexico</u>, 67 FR 57379, 57380 (September 10, 2002) and <u>Preliminary Results</u>, <u>Intent to Partially Rescind and Postponement of Final Results of Countervailing Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from the Republic of Korea, 67 FR 57395, 57399 (September 10, 2002).</u>

Mexinox argues petitioners provide no evidence to support their claim that its home market and CEP sales were made at the same LOT. According to Mexinox, petitioners do not oppose the Department's findings in past proceedings of this case nor the preliminary results of the instant review except to charge Mexinox with "exaggerating" the facts and providing a "highly arbitrary and subjective" analysis. Respondent's Rebuttal Brief at 10, quoting Petitioners' Case Brief at 4. With respect to petitioners' contention that Mexinox has suggested its SLP staff does virtually nothing to serve the U.S. market and exists solely to serve home market customers, Mexinox retorts the record shows "this is precisely the case." Respondent's Rebuttal Brief at 10 (emphasis in original). Citing its October 12, 2001 questionnaire response at A-8, Mexinox asserts the Commercial Directorate in SLP handles all home market and third country sales, and therefore incurs all of the related selling expenses in Mexico. Mexinox contrasts this with its "U.S. Sales Directorate" (i.e., Mexinox USA), contending that Mexinox USA, which is based in Chicago, handles essentially all selling activities related to Mexinox's U.S. sales. Making numerous references to its questionnaire and supplemental questionnaire responses, including Attachment A-21 of its May 8, 2002 SQR, Mexinox maintains its reported selling activities reflect this arrangement and that the selling activities performed by its SLP staff in connection with U.S. sales are minimal and of a very low intensity.

With regard to petitioners' argument that Mexinox's list of selling activities includes several activities already reflected in the reported expenses or in the difmer adjustment, Mexinox asserts it is unclear what bearing this would have on the LOT analysis even if true. Although an expense may be reflected in a particular adjustment field, Mexinox holds, the expense does not become any less of a selling activity for purposes of the LOT analysis. Arguing the Department expects this to be the case, Mexinox refers to question A.3.c of the standard questionnaire, which asks respondents to "{i}dentify the expense field in which the expenses associated with each selling activity will be captured in your response to Sections B and C."

According to Mexinox, petitioners' argument "exposes a profound confusion regarding the nature of selling expenses." Respondent's Rebuttal Brief at 12. As in prior segments of this proceeding, Mexinox argues, petitioners have confused the direct selling expenses and physical characteristics at issue with the indirect selling expenses linked to them, such as the administrative activity involved in making freight arrangements and in processing customer claims. For instance, Mexinox states, in shipping a package to a home market customer it will incur some freight charges that will be invoiced to Mexinox by the freight providers. In addition to these direct charges, Mexinox notes it will assume some indirect selling expenses when its staff makes freight arrangements, supervises loading and/or unloading, and processes the relevant paperwork. According to Mexinox, the direct freight expenses would be reported under

INLFTCH (inland freight to customer) or INLFTWH (inland freight to warehouse), whereas the indirect expenses and the activities from which they arise would be reported as selling activities. <u>Id.</u>

Mexinox claims petitioners are similarly mistaken in arguing that Mexinox's selling activities include some activities (e.g., further manufacturing) that are already considered in determining net prices or in making product comparisons. Mexinox states it provides its home market customers with various services that would normally be performed by service centers in the U.S. market, such as the further processing of coils, citing its October 12, 2001 QR at A-31. Asserting the processing costs incurred by Mexinox are already accounted for in its cost database, Mexinox argues the related selling activities such as order processing and customer consultations are reflected only in its list of selling activities. Mexinox contends the smaller coils and transaction volumes typical of the home market significantly impact the per-unit selling expenses related to home market sales and LOT, and refers to Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Mexico, 64 FR 30790, 30810 (June 8, 1999) (Original Investigation), in which the Department made that conclusion. Therefore, Mexinox holds, it is significant that the number of sales made during the current POR was greater in the home market than in the U.S. market.

Based on the above, Mexinox avers petitioners' argument regarding its selling activities analysis is baseless. According to Mexinox, the Department's conclusion that there are significant differences between its home market and CEP LOTs is correct and is supported fully by the record.

Next, Mexinox responds to petitioners' argument that if the Department continues to find LOT differences between its home market and CEP sales, the Department should conclude that sales to Mexinox Trading and other home market sales were made at different LOTs and find the Mexinox Trading LOT to be identical to the CEP LOT. Mexinox asserts petitioners are wrong in both regards. Mexinox argues the record shows sales to both home market end-users and distributors entail substantially more selling expenses than sales to Mexinox USA and are at a more advanced stage of marketing and distribution. Referring to its October 12, 2001 QR at A-30, Mexinox contends sales to Mexinox USA are similar to ex-factory sales involving little more than a logistical transfer of merchandise. In addition, Mexinox states, sales to Mexinox USA occur at the beginning of the distribution chain, as the merchandise typically flows from Mexinox USA to large U.S. service centers, who provide a number of value-added services and selling functions, and then to a smaller distributor/retailer or end-user. Conversely, Mexinox maintains, home market sales occur near the end of the distribution chain. Referring to Id. at A-31, Mexinox argues that since there are no intermediate service centers who provide services for home market customers, it therefore must provide these services itself. Mexinox contends these services "include selling activities related to the handling of small coils and small shipments, inventory maintenance, just-in-time deliveries, technical advice, credit and collection and others." Respondent's Rebuttal Brief at 15. Mexinox maintains it provides none of these selling activities to Mexinox USA except for credit and collection.

Mexinox asserts the different level of selling activities performed for sales to Mexinox USA and the home market is reflective of the fact these sales occur at different points in the chain of distribution. As Mexinox USA is essentially a "warehousing and distribution stop" for U.S. sales, Mexinox holds, the transfer of merchandise across the U.S.-Mexican border consists of only minimal selling activities (e.g., freight, invoicing, collection, etc.) performed at low levels of intensity. Id. Since Mexinox USA is not the final customer, Mexinox states it does not need to offer the same selling services offered to home market end-user and retailer customers. In addition, Mexinox claims, the greater intensity of selling activities provided in the home market is magnified by the fact that Mexinox tends to sell considerably smaller coils in smaller transaction volumes than in the U.S. market. For instance, citing its May 8, 2002 SQR at S1-19-20, Mexinox notes a certain percentage of coils sold in the home market weighed less than 9,000 pounds per coil, while in the United States a certain percentage weighed more than 9,000 pounds per coil. Respondent's Rebuttal Brief at 16, n.37. As the Department has noted in past proceedings, Mexinox argues, this results in higher administrative costs per ton in the home market. Mexinox asserts this evidence, which the Department verified in prior segments of review and was subject to verification in the instant review, clearly demonstrates that Mexinox's sales to both end-user and distributor customers in the home market are at a more advanced LOT than CEP sales. Mexinox holds petitioners do not seem to dispute this fact seriously, and states that petitioners appear "to concede that sales to home market retailers other than Mexinox Trading and sales to end-users are further from the factory than Mexinox's CEP sales." Id. at 17, n.39.

That being the case, Mexinox contends, the only relevant question is whether Mexinox Trading differs significantly from other home market retail customers. Mexinox claims the answer is no, as the Department confirmed during its verifications during past proceedings of this case. Referring to its October 12, 2001 QR at A-14, Mexinox states the record establishes that Mexinox Trading is an independently-operated retail distributor that buys stainless steel products from various suppliers and resells them to retailers in the Mexican market. According to Mexinox, the record also shows the selling functions provided with respect to Mexinox Trading do not differ substantially from those provided to other retail customers in the home market. Citing proprietary information from its October 12, 2001 QR at A-28, Mexinox contends there are no considerable differences in the way it conducts pricing and sales negotiations with respect to Mexinox Trading. Likewise, since Mexinox Trading is a retailer, Mexinox asserts it provides the same specialized technical assistance, customized processing, and delivery services as it provides to other home market customers. Mexinox contends credit and collection is the only function it performs with respect to Mexinox Trading with any less intensity, since Mexinox Trading presents less of a credit risk as an affiliate of Mexinox. Respondent's Rebuttal Brief at 18.

Referring to petitioners' argument that Mexinox reported its selling activities so as to support its claim for a CEP offset and presented the CEP offset as a "veritable fait accompli," Mexinox contends petitioners' argument "is little more than a mix of inflammatory accusations and unfounded assertions" and warrants no further response. Respondent's Rebuttal Brief at 18. Mexinox avers petitioners' argument cannot be supported by any authoritative reference, valid citation to the record, or factual

analysis. Pointing to the petitioners' proposition that Mexinox's selling activities would have been much less intense for home market affiliated customers, especially Mexinox Trading, since it is located in SLP, Mexinox maintains its October 12, 2001 QR at A-14 contains no evidence to support that proposition. Mexinox asserts petitioners' argument can be reduced to the following: "(1) Mexinox's sales to Mexinox USA are very close to the factory and involve few selling functions; (2) Mexinox USA is an affiliate of Mexinox; (3) Mexinox Trading is also an affiliate of Mexinox; (4) therefore, sales to Mexinox USA are also close to the factory and involve few selling functions." Respondent's Rebuttal Brief at 18-19. Mexinox holds this argument is illogical and contradicted by the facts on the record.

Mexinox contends affiliation does not provide proof that sales to Mexinox USA and Mexinox Trading are at the same LOT. Mexinox alleges the most egregious flaw in petitioners' analysis is that it fails to recognize Mexinox USA and Mexinox Trading are completely different types of customers and that sales to each occur at different points in the distribution chain. In a certain number of instances, Mexinox notes, the sale from Mexinox to Mexinox USA takes place before the merchandise is sold to a large service center, citing proprietary information in its October 12, 2001 QR at A-24. In addition, Mexinox contends, since 100 percent of Mexinox's U.S. sales travel through either Brownsville or Laredo, Texas for warehousing or freight transfer, the majority of the selling functions performed in conjunction with these sales "are more common, routine, and simplified than for any of Mexinox's home market sales." Respondent's Rebuttal Brief at 19. In contrast, Mexinox asserts, Mexinox Trading is a relatively small retail operation whose main focus is to stock material for resale and who does not have the ability to handle large master coils. Thus, Mexinox states, it must provide Mexinox Trading with a bundle of customized selling functions that would typically be provided by smaller service centers in the United States.

Based on these facts, Mexinox asserts, it is clear that sales to Mexinox USA and Mexinox Trading are at different LOTs and that there is only one LOT in the home market.

Mexinox then replies to petitioners' argument that the Department should adjust for LOT differences using a LOT adjustment rather than the CEP offset, and that the amount of the LOT adjustment should be based on the arm's-length test ratio for Mexinox Trading. Mexinox asserts the arm's-length test ratio does not serve as an appropriate means to make a LOT adjustment because neither section 773(a)(7)(A) of the Tariff Act nor section 351.412(e) of the Department's regulations allow the arm's-length test results to be utilized as a proxy for LOT differences. Aside from the statute's instructions, Mexinox asserts the difference in the way the arm's-length test and LOT analysis may be carried out also precludes the Department from employing the arm's-length test to make LOT adjustments. In the instant review, Mexinox holds, the two analyses involve two different sets of sales: the arm's-length test compares weighted-average prices to Mexinox Trading with the prices to all unaffiliated home market customers, whereas the LOT analysis compares weighted-average prices to Mexinox Trading with prices to all other home market customers. Further, Mexinox argues, using the arm's-length test as a proxy for a LOT adjustment results in increasing the gap between CEP and home market prices. Not

only is this result counterintuitive, Mexinox avers, but it contradicts both the letter and the spirit of the antidumping law.

In accordance with section 772(a)(7)(A) of the Tariff Act and Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27372 (May 19, 1997) (Final Rule), Mexinox claims the purpose of making a price-based LOT adjustment is to reduce the price differential that occurs between CEP and home market sales as a result of the sales being made at different LOTs. Noting the methodology for calculating a LOT adjustment as articulated in section 351.412(e) of the Department's regulations, Mexinox argues "the underlying assumption of this calculation, of course, is that there are no LOT-related differences in price between the CEP LOT and the home market LOT deemed to be equivalent to the CEP LOT." Respondent's Rebuttal Brief at 22. Mexinox holds that making an adjustment to NV to account for differences between two home market LOTs is analogous to making an adjustment for LOT differences between NV and CEP.

Mexinox alleges the methodology proposed by petitioners causes the opposite result, since "the LOT-related price differential between the CEP sale and the NV sale actually <u>increases</u> and the gap between the two LOTs widens." <u>Id.</u> (emphasis in original). According to Mexinox, petitioners appear to acknowledge, or at least do not dispute, that sales to home market unaffiliated customers are more remote than sales to Mexinox USA. Therefore, for comparisons between CEP sales and sales to unaffiliated home market customers, Mexinox asserts that logic implies home market price must be decreased to make it comparable to CEP. However, Mexinox argues, petitioners' proposal increases NV by the amount of the Mexinox Trading arm's-length ratio, thereby increasing the price differential between the CEP and home market sale. Mexinox contends petitioners' proposal reduces comparability and is clearly incongruous with the statute and the regulations. <u>Id.</u> at 23.

Mexinox maintains the result of petitioners' proposal reveals the critical flaw in their LOT analysis, namely, that the CEP LOT and the LOT of sales to Mexinox Trading are not equivalent. If they were, Mexinox holds, petitioners' LOT adjustment would place sales to unaffiliated home market customers at the same LOT as CEP sales. Rather, Mexinox contends, the record clearly establishes that Mexinox Trading sales are at a LOT more remote from the factory than CEP sales, and that the LOT of Mexinox Trading sales does not differ substantially from the LOT of sales to other home market retail customers. Mexinox argues only the CEP offset can help to diminish the LOT-related price differential between home market and CEP sales² and therefore the Department should continue to apply the CEP offset for these final results.

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² In a footnote, Mexinox points to the argument in its case brief that the CEP offset does not completely remove the differential because it is arbitrarily "capped" at the amount of the U.S. indirect selling expenses. Mexinox therefore argues the Department should make an additional circumstance of sale adjustment. <u>See</u> Comment 1 of this Memorandum.

Department's Position: We disagree with petitioners. First, it bears noting that prior to comparing the home market LOT(s) to the LOT(s) found in the United States, the Department's practice is first to consider whether different LOTs exist within each market. In making their argument that sales to Mexinox Trading constitute a separate LOT from Mexinox's other home market sales, petitioners have attributed to Mexinox Trading the selling activities listed in Attachment A-21 of Mexinox's May 8, 2002 SQR for home market inventory sales to distributors/retailers. However, petitioners then proceed to compare Mexinox's sales to Mexinox Trading to its sales to Mexinox USA, rather than to other home market sales. Moreover, petitioners' analysis has arbitrarily collapsed Mexinox's selling activities into fewer categories, but has failed to establish that the selling functions are identical in the United States and Mexico. For the reasons noted below, we find that significant differences in LOT exist between Mexinox's home market and U.S. sales.

Because petitioners' argument does not rely on the correct basis for comparison, we have reconsidered information related to Mexinox's reported selling activities to determine whether different LOTs exist in the home market. Section 351.412(c)(2) of the Department's regulations states that the Secretary will determine sales are made at different LOTs if they are made at different marketing stages (or their equivalent). To make this determination, the Department reviews factors such as selling functions or services, classes of customer, and the level of selling expenses for each type of sale. Different stages of marketing necessarily involve differences in selling functions, but differences in selling functions, even if substantial, are not alone sufficient to establish a difference in the LOT. Similarly, while customer categories such as "distributor" and "wholesaler" may be useful in identifying different LOTs, they are insufficient in themselves to establish that there is a difference in LOT.

Therefore, for these final results we have evaluated factors such as selling functions or services, customer classes, and the level of selling expenses for home market sales in order to determine whether sales to Mexinox Trading were at a different LOT than Mexinox's other home market sales. In doing so, we have found no record evidence demonstrating any significant differences between the services provided to Mexinox Trading as opposed to those provided to other home market customers. These services include technical services, order processing, inventory maintenance, and freight arrangements, among others. Similarly we have found no evidence of any substantial differences between the <u>level</u> of services provided to Mexinox Trading and other home market customers. As a result, we continue to find there is only one LOT in the home market.

For the instant review, we have determined that only one LOT, the CEP LOT, existed in the United States. See Preliminary Results at 51207. Having determined there is one LOT in the home market, we must now determine whether home market sales were at a different LOT than the CEP LOT, and if so, whether a LOT adjustment is warranted. To determine whether NV sales are at a different LOT than CEP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent

price differences between the sales on which NV is based and comparison market sales at the LOT of the export transaction, we make a LOT adjustment under section 773(a)(7)(A) of the Tariff Act.

When we compared CEP sales (after deductions made pursuant to section 772(d) of the Tariff Act) to home market sales, we found that fewer selling activities were performed with respect to CEP sales, and, while there were some activities performed for both the home market and CEP LOTs, several of them were carried out at a greater level of intensity for the home market LOT. For example, our examination of Mexinox's reported selling activities showed that Mexinox provided warranty services and "just-in-time" inventory services for its sales to home market customers but not for its sales to Mexinox USA. See, e.g., Mexinox's May 8, 2002 SQR at Attachment A-21. In addition, regardless of whether technical service-related activities could be collapsed into fewer categories, the record shows these activities were provided for Mexinox's sales to home market customers but not for sales to Mexinox USA. Id. While freight and delivery arrangements occurred for both sets of sales, they were carried out at a lower intensity for sales to Mexinox USA. Generally, for CEP sales, Mexinox transported merchandise from SLP to Brownsville by truck or to Chicago or Los Angeles by truck and rail. See, e.g., Mexinox's November 7, 2001 QR at C-27. However, freight and delivery arrangements in the home market required greater logistical planning, as Mexinox transported merchandise to many different locations and sometimes used intermediate warehousing. See, e.g., Id. at B-28-31 and at Attachment B-3. Similarly, customer order processing and credit and collection were provided for sales to home market customers and sales to Mexinox USA, but in both instances were performed at a lower intensity for Mexinox USA. The fact that Mexinox USA performed many of the logistical functions with respect to U.S. sales, such as inventory services, freight and delivery arrangements, credit and collection, and customer order processing, rather than Mexinox, is consistent with our finding that all of Mexinox's sales to Mexinox USA are properly categorized as CEP sales.

Moreover, we found that Mexinox's sales to home market customers took place near the end of the distribution chain, while its sales to Mexinox USA occurred near the beginning of the chain of distribution. In other words, home market sales involved a more advanced stage of distribution than CEP sales. For example, in the home market Mexinox provided certain downstream selling functions that are normally performed by service centers in the U.S. market (e.g., technical advice, credit and collection, etc.). See, e.g., Mexinox's October 12, 2001 QR at A-31.

Based on our analysis, we determine that CEP and the starting price of home market sales represent different stages in the marketing process, and are thus at different LOTs. Therefore, when we compared CEP sales to home market sales, we examined whether a level-of-trade adjustment may be appropriate. In this case, Mexinox sold at one LOT in the home market; therefore, there is no basis upon which to determine whether there is a pattern of consistent price differences between levels of trade. Further, we do not have the information which would allow us to examine pricing patterns of Mexinox's sales of other similar products, and there are no other respondents or other record evidence on which such an analysis could be based.

Since the facts of the record do not permit us to make a price-based LOT adjustment³, we must now determine whether a CEP offset is appropriate. Under section 773(a)(7)(B) of the Tariff Act (the CEP offset provision), we adjust NV if the NV LOT is more remote from the factory and there is no basis for determining whether the differences between the NV and CEP LOTs affect price comparability. Because the data available do not provide an appropriate basis for making a LOT adjustment and the level of trade in Mexico for Mexinox is at a more advanced stage than the level of trade of the CEP sales, we find that a CEP offset is appropriate in accordance with section 773(a)(7)(B) of the Tariff Act. As a result, we have continued to grant the CEP offset for these final results.

Adjustments to United States Price

Comment 4: CEP Profit

Mexinox states that sections 772(d)(3) and 772(f) of the Tariff Act direct the Department to subtract an amount for profit allocable to selling, distribution and further-manufacturing activities in the United States when computing CEP. Pursuant to the statute, Mexinox notes, CEP profit is calculated as a percentage of the total actual profit (<u>i.e.</u>, total revenue less total expenses) realized by the foreign manufacturer and its affiliates in connection with sales of the merchandise under review. Specifically, Mexinox states, the total actual profit is applied to the ratio of total U.S. selling expenses to total U.S. and home market selling expenses. Respondent's Case Brief at 8.

In reality, Mexinox argues, the Department computes "a blended 'CEP profit rate' by dividing total profits by total selling expenses." <u>Id.</u> Mexinox states the resulting CEP profit rate is then applied to the U.S. selling expenses for each CEP sale. However, Mexinox asserts, this approach achieves the same net effect as that under the statute.

For the instant review, Mexinox states, the Department calculated the CEP profit rate using U.S. sales made during the 12-month period of review (POR) and home market sales made during the POR plus the "window" months (<u>i.e.</u>, the extended 17-month reporting window). <u>Id.</u> at 9. According to Mexinox, this caused the CEP profit rate to be weighted far more heavily on home market profit rates than on U.S. profit rates. Mexinox maintains this is distortive not only because the weighting is disproportionate, but also because CEP profit is only applied to U.S. market sales. Therefore, for these final results, Mexinox urges the Department to recalculate CEP profit using only U.S. and home market sales made during the POR. Mexinox contends this will ensure a CEP profit rate that is not biased toward either the U.S. or home market.

Petitioners contend the Department has already considered this issue and dismissed it. They cite Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands: Final Results of Antidumping

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³ Since we are unable to make a price-based LOT adjustment, petitioners' argument with respect to using the arm's-length test as a proxy for a LOT adjustment is moot.

Duty Administrative Review, 62 FR 18476, 18478 (April 15, 1997) (Cold-Rolled from the Netherlands), in which the Department noted that for the NV calculation it requested information on expenses incurred during the window months, and in accordance with the statute used these expenses to calculate CEP profit. Petitioners also cite Certain Stainless Steel Wire Rods From France: Final Results of Antidumping Duty Administrative Review, 63 FR 30185, 30187 (June 3, 1998), in which the Department determined it was appropriate to compute constructed value (CV) profit based on contemporaneous home market sales data used as the basis of its NV calculation. Finally, petitioners refer to Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan: Final Results of Antidumping Duty Administrative Review, 66 FR 11555 (February 26, 2001) and the accompanying Decision Memorandum at Comment 1, in which the Department stated it based CV profit on all home market sales used in its analysis. Petitioners hold the Department should therefore reject Mexinox's argument.

Department's Position: We disagree with Mexinox. The Department has used the home market sales during the extended window period to form the basis of its normal value calculation. Thus, in accordance with the statute and its normal practice, the Department has used these expenses in the calculation of the CEP profit ratio. See, e.g., Cold-Rolled from the Netherlands at 18478. As stated in Cold-Rolled from the Netherlands, "[t]he expenses requested by the Department for the purpose of establishing the normal value of the foreign like product ... were those incurred during the extended window period. Consequently, the statute provides that these expenses are to be used in the calculation of the CEP profit ratio." Therefore, for these final results we have made no changes to our methodology for calculating CEP profit.

Comment 5: Duty Drawback

Citing the narrative discussion in Mexinox's June 3, 2002 SQR at 7, petitioners contend Mexinox's reported costs only include certain import duty payments. Petitioners therefore request that the Department reexamine the position expressed in the 1999-2000 Final Results and the accompanying Decision Memorandum at Comment 5 that "when reported production costs include only actual duties, a duty drawback adjustment can still be calculated as if duties had been paid in full." Petitioners' Case Brief at 17.

Petitioners state the Department's position would be correct if: (1) separate production costs were computed for products sold domestically (and thus subject to duty); and (2) duty drawback was restricted to the actual duties paid and was set to zero whenever duty-exclusive CV was used as NV. However, petitioners claim, an imbalance occurs because average production costs are computed without considering whether the final product was exported. As a result, petitioners argue, the import-duty component of material costs is diluted because the average COM for each model is based on both duty-inclusive and duty-exempt materials. To illustrate this problem, petitioners give an example in which a respondent is forgiven payment of a 10 percent import duty and there was no viable comparison market. Petitioners maintain the Department's current methodology would incorrectly

result in (a) NV (based wholly on CV) consisting of <u>no</u> duty component, but also (b) a 10 percent increase in USP via a duty drawback adjustment. Thus, petitioners argue, "a foreign government wishing to preclude a domestic industry from ever facing dumping charges could 'impose' but not collect a 100 percent 'duty' to ensure a 100 percent duty drawback credit on U.S. sales." <u>Id</u>.

Petitioners declare that while they are not implying the Programas de Importacion Para Producir Artículos de Exportación (the PITEX program) was designed to reduce dumping liabilities, it is not equitable to permit a hypothetical duty that is not part of reported costs (i.e., the unpaid duty under the PITEX program) to result in an upward adjustment to USP. Petitioners hold that if the duty was actually collected and later refunded, it would be recorded under material costs, thereby increasing those costs, but the treatment on the U.S. side would be the same. Petitioners argue the Department would not permit a collected duty that was later refunded to act as both (a) a reduction to reported costs and (b) an increase to USP, since granting both adjustments would result in double counting. However, petitioners assert, "double counting is exactly what occurs simply because of an accounting method between the government and exporters whereby duties are forgiven rather than paid and then refunded." Id. at 18. Thus, petitioners urge the Department to correct this imbalance by either (1) increasing material costs to fully account for actual duties, regardless of whether or not they were paid; or (2) decreasing the duty drawback claim to reflect the proportion of duties actually included in material costs. Referring to Mexinox's May 8, 2002 SQR at Attachment B-44, petitioners contend the Department could make the latter adjustment by multiplying duty drawback by the ratio of home market sales to all sales, Petitioners state this adjustment would prevent the duty drawback adjustment from exceeding the amount of duties included in the cost of production.

Mexinox contends the Department made a duty drawback adjustment to USP in accordance with section 772(c)(1)(B) of the Tariff Act for the preliminary results, just as it did for both the original investigation and the 1999-2000 administrative review of stainless steel sheet and strip in coils from Mexico. Citing the Original Investigation at 30813 as well as the 1999-2000 Final Results and the accompanying Decision Memorandum at Comment 5, Mexinox asserts a duty drawback adjustment is justified because under the PITEX program it only pays import duties on materials incorporated into products sold in Mexico, and because it imports 100 percent of its hotband on a temporary duty-deferred basis under the PITEX program. Thus, Mexinox claims, it meets both prongs of the Department's two-pronged test for duty drawback adjustments.

Mexinox states that petitioners do not argue Mexinox has not met the Department's criteria for a duty drawback adjustment, nor do they question whether Mexinox reported material costs inclusive of all duties paid or accrued, as it did in accordance with the instructions in the Department's questionnaire at D-15. Rather, Mexinox contends, petitioners have asked the Department to ignore its established practice with respect to duty drawback adjustments and prescribe new criteria "to address what Petitioners perceive to be an 'imbalance' between the amount of duties included in the raw material costs and the amount of drawback granted." Respondent's Rebuttal Brief at 42.

Mexinox asserts there is no legal precedent or policy rationale for limiting duty drawback to the average duties included in raw material costs. Pointing to <u>Avesta Sheffield</u>, <u>Inc. v. United States</u>, 838 F. Supp. 608, 611-12 (CIT 1993) (<u>Avesta</u>), Mexinox holds the CIT rejected claims that drawback should be restricted to the amount of duties included in foreign market value (now normal value) or capped at the average amount of duties included in raw materials used (both dutied and nondutied) to achieve balance. With respect to the former claim, Mexinox notes the CIT found that "[t]he statute provides for the duty drawback adjustment without reference to any finding that the home market price is reflective of duties." Respondent's Rebuttal Brief at 43, citing <u>Avesta</u> at 611-12. Regarding the latter claim, Mexinox notes the CIT determined that:

As concerns either raw materials and sales, there is no requirement that ITA match overall rebates to overall duties to achieve balanced numbers on both sides of the comparison. The statute allows a full upward adjustment to U.S. price for duties 'which have been rebated.' 19 U.S.C. § 1677a(d)(1)(B). ITA's determination is not inconsistent with the statute. Its duty drawback adjustment to U.S. price is sustained.

Id.

Mexinox asserts the same argument was advanced by petitioners and subsequently dismissed by the CIT in Oil Country Tubular Goods from Korea: Final Results of Antidumping Duty Administrative Review, 64 FR 13169, 13172-73 (March 17, 1999) (OCTG from Korea). Based on these cases, Mexinox contends petitioners' assertions in the instant review are legally unsupportable and wrong from a policy perspective.

Department's Position: We disagree with petitioners. Section 772(c)(1)(B) of the Tariff Act explicitly provides for a duty drawback adjustment for import duties "imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject product to the United States" (emphasis added). In accordance with this provision, the Department will grant a duty drawback adjustment if we determine that:

1) import duties and rebates are directly linked to and are dependent upon one another; and 2) the company claiming the adjustment can demonstrate that there are sufficient imports of raw materials to account for the duty drawback received on the exports of the manufactured product.

During the POR, Mexinox imported all of the hot-rolled stainless steel coils used in the production of subject merchandise under the PITEX program. Under this program, the Mexican government suspends the collection of duties from Mexinox on imports of raw materials (<u>i.e.</u>, hotband), contingent upon the exportation of the materials within the requisite amount of time. <u>See</u> Mexinox's November 7,

⁴ Noting this decision was made prior to the Uruguay Round Agreements Act, Mexinox contends that none of the resulting amendments to the statute affect the validity of the CIT's determination in <u>Avesta</u>.

2001 QR at Attachment C-14-A. The PITEX program clearly falls within the express language of section 772(c)(1)(B) of the Tariff Act as one in which duties "...have not been collected, by reason of the exportation of the subject product to the United States." The Department has reviewed this type of program previously and has allowed an adjustment for duty drawback when respondents meet the requirements of our two-pronged test. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Mexico, 67 FR 55800 (August 30, 2002) and the accompanying Issues and Decision Memorandum at Comment 4.

For duty drawback programs in which import duties are not collected, the Department examines whether import duties were actually not collected by reason of exportation of the subject merchandise to the United States. Under the PITEX program, Mexinox only paid import duties on raw materials that were incorporated into finished products which were then sold in the home market. See Mexinox's November 7, 2001 QR at C-36 and at Attachment C-14-A. Thus, we determine Mexinox has met the first requirement of the Department's test for receiving a duty drawback adjustment. Since Mexinox imported all of the hotband used in the production of subject merchandise, we are satisfied that it had sufficient imports of raw materials to account for its exports of stainless steel sheet and strip in coils to the United States. See, e.g., Id. at C-36 and D-8. Therefore, we find Mexinox has also met the second requirement of our two-pronged test.

In their brief, petitioners assert the Department's methodology for making duty drawback adjustments causes an "imbalance" because average production costs are computed without considering whether the final product was exported. Petitioners therefore argue that we should make an adjustment to correct this imbalance. As noted above, section 772(c)(1)(B) of the Tariff Act allows for an adjustment to USP for duties that have been rebated, or have not been collected, by reason of importation to the United States. For duty drawback programs involving rebated duties, the Department restricts the amount of the drawback adjustment to the amount of duties paid when the amount of duties rebated exceeds the amount of duties paid. See, e.g., OCTG from Korea at 13173. When duties are not collected, we likewise limit the drawback adjustment to the amount of duties normally associated with the imported materials. Mexinox properly has restricted the amount of duty drawback to the average amount of duties it would have had to pay on the raw materials incorporated into finished products exported to the United States if the PITEX program did not exist. See Mexinox's November 7, 2001 QR at C-37. We note, however, that in rebate programs as well as programs in which duties are not collected, the amount of duties reported in a respondent's costs should reflect the amount of duties normally associated with the imported raw materials used to produce the merchandise under consideration, regardless of whether they were collected and rebated, or not collected, by reason of exportation.

Therefore, because Mexinox has met both requirements of our two-pronged test and has limited the amount of its claimed drawback to the average amount of duties it would have had to pay if the products incorporating the raw materials were not exported to the United States, we have continued to accept Mexinox's reported duty drawback adjustment for these final results.

Comment 6: U.S. Indirect Selling Expenses

Petitioners assert the Department should revise the numerator of Mexinox USA's ISE ratio to include a certain expense that relates to economic activity in the United States and presumably encompasses expenses incurred by Mexinox on Mexinox USA's behalf. Petitioners argue the Department also should revise the numerator of the ISE ratio to include a "bad debt allowance" shown on Mexinox USA's 2000 financial statement. Since there is not an exact POR amount for either expense, petitioners hold, the Department should compute an estimated POR amount based on the ratio that each expense represented for 2000. Petitioners' Case Brief at 21, n.4.

In addition, petitioners claim the denominator of the ISE ratio should be amended to reflect only those sales which took place with third parties and should not include sales to "Parent and affiliates." Referring to note 2 of Mexinox USA's 2000 financial statement, which is included at Attachment A-11-B of Mexinox's October 12, 2001 QR, petitioners state that Mexinox USA's sales to "Parent and affiliates" consisted of raw material sales. Petitioners contend Mexinox USA's auditors required these sales to be listed separately from Mexinox USA's main business, which consists of selling finished stainless steel products to U.S. customers. Since the auditors did not require that other affiliated-party sales be distinguished from Mexinox USA's main business, petitioners maintain that the auditors sought to delineate between transactions where Mexinox USA performed a significant role, and those where it did not. Accordingly, petitioners state, including the sales to "Parent and affiliates" results in overstating the denominator of the ISE ratio.

Petitioners contend the relevant accounting principle in effect here "is that a company should not recognize as a sale the full value of merchandise for transactions where the company role was limited to that of a broker." Petitioners' Case Brief at 22, citing Financial Accounting Standards Board's Emerging Issues Task Force Abstract, Issue 99-19 (July 20, 2000). According to that publication, petitioners state, current Generally Accepted Accounting Principles (GAAP) do not permit a company to include in the total sales amount revenues from sales in which it does not play a significant role. Petitioners suggest that Mexinox USA's auditors were cognizant of this principle and therefore required Mexinox USA's sales of finished merchandise to be presented separately from those where Mexinox USA simply served as a broker for its parent. Petitioners argue these broker services have already been reflected in Mexinox's reported material costs, citing Mexinox's June 3, 2002 SQR at 16. Petitioners aver that "just as a commissionaire would book only its commission as revenue (rather than the entire value of the product for which it is receiving a commission), so Mexinox USA's 'sale' is truly only that of brokerage services (rather than the entire value of hotbands relayed to Mexinox)." Petitioners' Case Brief at 22.

Mexinox contends it has properly reported Mexinox USA's ISEs and therefore submits that each of petitioners' claims should be rejected. With respect to the expense petitioners claim to be related to economic activity in the United States, Mexinox argues that petitioners have simply urged the Department to include this amount in Mexinox USA's ISEs without furnishing any additional argument

or explanation. According to Mexinox, "[t]he amount at issue reflects certain routine corporate services that are performed by Mexinox on behalf of Mexinox USA." Respondent's Rebuttal Brief at 49. Mexinox claims the actual amount of this expense is already reflected in "the reported general administrative expenses" and thus adding it to the numerator of the ISE ratio would result in double-counting. <u>Id.</u>

In addition, Mexinox argues, including this expense in Mexinox USA's ISEs would contradict the statute and Department practice since this expense is not subtracted from CEP under section 772(d) of the Tariff Act. Referring to the Final Rule at 27351, the Antidumping Agreement at Article 2.4, Timken Co. v. United States, 16 F. Supp. 2d 1102 (CIT 1998), and the Department's Antidumping Manual at Chapter 7, Section III.C, Mexinox states that selling expenses incurred in the home market cannot be removed from CEP unless they concern economic activities in the United States. Respondent's Rebuttal Brief at 49-50. Mexinox holds the Department views this requirement as meaning that expenses incurred in the home market can only be deducted from CEP if they pertain to the downstream sale between the affiliated U.S. importer and its unaffiliated U.S. customer. Mexinox contends that selling expenses incurred in the home market that are corporate and general in nature or relate specifically to the sale between the producer and its affiliated U.S. importer cannot be subtracted from CEP. Mexinox claims the expense at issue in this case is general and corporate in nature and does not relate directly to the sale from Mexinox USA to unaffiliated U.S. customers, and therefore its inclusion in U.S. ISEs (i.e., deducting it from CEP) is legally inadmissible.

With respect to the allowance shown in Mexinox USA's financial statement, Mexinox asserts that petitioners' argument implies "either a serious misunderstanding of the accounting nature of this item, or else a blatant attempt to distort and overstate Mexinox's reported selling expenses." Id. at 50-51. Mexinox argues that petitioners are mistaken in stating the amount at issue is reflected on Mexinox USA's income statement. Referring to Mexinox USA's audited financial statement for fiscal year 2000, which is included at Attachment A-11-B of its October 12, 2001 QR, Mexinox contends Note 1 clarifies the allowance at issue is reflected in "Trade accounts receivable," which is an asset item on Mexinox's balance sheet. Mexinox explains that "Trade accounts receivable" reflects the net amount of two components: gross accounts receivable, which is an asset account, and the allowance for doubtful accounts, a contra-asset account.

Mexinox maintains the Department's established practice is to include only expensed amounts for bad debt in the ISE ratio. Referencing Attachment C-36 of its May 8, 2002 SQR, Mexinox states it has included the bad debt expensed by Mexinox USA during the POR in the ISE ratio via the account "Bad Debt Provision." Mexinox contends it is the Department's long-standing practice to exclude non-expensed allowances or reserves such as these from the ISE ratio, citing Porcelain-on-Steel Cookware From Mexico: Final Results of Antidumping Duty Administrative Review, 65 FR 30068 (May 10, 2000) (POS Cookware from Mexico) and the accompanying Decision Memorandum at Comment 4 and Roller Chain, Other Than Bicycle, From Japan; Final Results of Antidumping Duty Administrative Reviews, 57 FR 46535, 46538 (October 9, 1992). Mexinox holds these cases clearly delineate the

Department's practice and therefore it is not surprising that petitioners have not pointed to any law or precedent in making their argument. Since the amount at issue is simply an allowance (<u>i.e.</u>, a non-expensed amount) shown on the balance sheet, Mexinox argues the Department should continue to exclude this item from the numerator of the ISE ratio.

Lastly, Mexinox asserts petitioners are wrong in arguing that sales to "Parent and affiliates" should be removed from the denominator of the ISE ratio. First, Mexinox maintains, petitioners are incorrect that Mexinox USA's independent auditors required sales of raw materials to be distinguished from other sales on the income statement in keeping with Financial Accounting Standards Board (FASB) disclosure rules. Mexinox claims petitioners misinterpreted Mexinox's financial statements, comparing proprietary sales figures for Mexinox USA's sales to affiliates for 1999 and 2000. Mexinox argues petitioners have failed to support their claim that Mexinox USA's auditors treated sales of raw materials differently from other sales to affiliates.

Mexinox holds that petitioners also disregard the fact that Mexinox USA's auditors represented sales of raw materials as "sales" for financial reporting purposes. According to Mexinox, Mexinox USA's auditors do not concur with petitioners' assertion that such transactions merely entail brokerage services. Respondent's Rebuttal Brief at 53. If Mexinox USA's auditors been concerned those transactions merely involved brokerage services, Mexinox contends they would have addressed their concerns in their audit report. However, Mexinox avers, Mexinox USA's audit report is completely clean.

Additionally, Mexinox asserts, Mexinox USA's role in selling these raw materials surpassed that of a mere "broker" or "commissionaire." According to Mexinox, Mexinox USA bought the material, was invoiced for it, and took title to it. Mexinox notes that Mexinox USA also paid the supplier, citing the audit report to Mexinox USA's financial statements for fiscal year 2000 ("[t]he Company sells all of its raw materials to the Parent"). Referring to its October 12, 2001 QR at A-14, Mexinox states that Mexinox USA also offered logistical support such as freight arrangements and inventory services prior to shipment from Brownsville. Even if FASB rules call for the separate disclosure of sales in which the company played an insignificant role, Mexinox argues that situation did not exist here.

Mexinox contends petitioners' arguments regarding affiliated-party sales lack substance. Because Mexinox USA incurred ISEs related to its sales of subject merchandise to both unaffiliated and affiliated customers, Mexinox claims it would be improper and distortive for the Department to remove sales to "Parent and affiliates" from the denominator of the ISE ratio. Therefore, Mexinox contends the Department should not make any additional adjustments to Mexinox USA's ISE ratio for these final results.

Department's Position: Regarding the expense that petitioners claim is related to economic activity in the United States, we disagree with petitioners that this amount should be included in the U.S. ISE numerator. As we stated in <u>Tapered Roller Bearings and Parts Thereof</u>, Finished and <u>Unfinished</u>, From

Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews 66 FR 15078 (March 15, 2001) and the accompanying Decision Memorandum at Comment 3.3, we will deduct from CEP only those expenses associated with economic activities in the United States which occurred with respect to sales to the unaffiliated U.S. customer. Note 2 of Mexinox USA's 2000 financial statement indicates that this expense encompasses general administrative services provided by Mexinox to Mexinox USA. Thus, the record suggests these expenses are general and administrative in nature and are not associated with economic activity in the United States. Further, such expenses would already be reflected in Mexinox's reported G&A expenses. Therefore, we have not adjusted Mexinox's U.S. ISEs for this amount.

With respect to the allowance shown on Mexinox USA's financial statement, we also disagree with petitioners. This item is reflected in "Trade accounts receivable," which is an asset on Mexinox USA's balance sheet. As indicated in <u>POS Cookware from Mexico</u> and the accompanying Decision Memorandum at Comment 4, we do not include non-expensed reserves or allowances in the selling expense calculation. Furthermore, Mexinox USA's ISE calculation already includes an amount for bad debt expensed during the POR. Therefore, we have not revised the numerator of the U.S. ISE ratio to include this allowance.

Finally, we agree with petitioners that sales of raw materials should be removed from the denominator of the ISE ratio. Notwithstanding why Mexinox USA's auditor separated sales to "Parent and affiliates" from sales to "Third parties," Mexinox USA's sales of raw materials to its parent can be construed as an intercompany transfer of merchandise, as they involve only a routine transfer of merchandise. Mexinox USA's raw material sales to Mexinox therefore are distinguishable from its sales of finished goods to both affiliated and unaffiliated customers, since the latter require a much greater degree of logistical planning. Based on information contained in Attachment C-36 of Mexinox's May 8, 2002 SQR, we have identified the value of Mexinox USA's raw material sales to Mexinox for the POR. Therefore, for these final results we have removed the value of Mexinox USA's raw material sales from the denominator of U.S. ISEs. Moreover, while we deem it inappropriate to assign an equal amount of indirect selling expenses to the affiliated transfers of raw materials as compared to sales of finished merchandise, we do consider it appropriate to attribute some expenses to these transfers. Thus, we also have reduced the numerator of the indirect selling expense ratio by an amount attributable to the expenses incurred by Mexinox USA in selling these raw materials to Mexinox. See the Department's Final Analysis Memorandum, dated February 3, 2002, for more details regarding our recalculation of U.S. ISEs.

Comment 7: Additional Mexinox USA Expenses

In its May 8, 2002 SQR at S1-77, Mexinox provided information related to a penalty notice from the U.S. Customs Service. Petitioners request the Department investigate whether the issue surrounding this item has been resolved, and also review Mexinox USA's 2001 financial statements for any information related to this item.

Mexinox responds that petitioners have not pinpointed anything related to this penalty notice that has any bearing on this review. Referring to the explanation provided in its May 8, 2002 SQR, Mexinox asserts it is indisputable that as of at least May 8, 2002, it had not incurred any expenses in connection with this issue. Therefore, Mexinox states, since no such expenses were incurred during the POR, it is evident the item at issue has no bearing on the outcome of this review.

With respect to petitioners' request that the Department investigate this issue further, Mexinox states it cannot see the relevance of doing so.

Department's Position: We agree with Mexinox. The record indicates that Mexinox did not incur any expenses in connection with the penalty notice from the U.S. Customs Service during the POR. Since this item did not result in an actual POR expense, we have not made any adjustments to USP to account for this item.

Comment 8: Calculation of the U.S. Interest Rate

Referring to Mexinox's November 7, 2001 QR at Attachment C-15-B, petitioners state Mexinox originally calculated its U.S. short-term interest rate based on a simple average. Citing Mexinox's May 8, 2002 SQR at S1-77 and Attachment C-35, petitioners note Mexinox then provided a weighted-average interest rate based on the principal balances and number of days outstanding for each loan. Petitioners state Mexinox's revised interest rate was based on short-term borrowing spread over a few days at the beginning of the POR and at the end of the POR, with no borrowing activities in between. Petitioners allege the end-of-period borrowing "appears to be a fictitious transaction designed to artificially lower the average borrowing rate." Petitioners' Case Brief at 24. Petitioners urge the Department to reject Mexinox's revised rate and instead use a certain rate that was in effect during most of the POR.

Mexinox responds that petitioners' claim appears to be based on the fact that interest rates at the end of the POR were slightly lower than at the start of the POR. Stating there is no substance to this claim, Mexinox asserts the loans at issue clearly reflect arm's-length transactions with an unaffiliated lender. Thus, Mexinox argues the Department should continue to accept its interest rate calculation for these final results. Respondent's Rebuttal Brief at 56-57.

Mexinox contends it is evident that interest rates fell during the POR. Pointing to its November 7, 2001 QR at Attachment KMC-6, Mexinox notes that Federal Reserve short-term interest rates declined over the course of the POR. Thus, Mexinox holds, its own borrowings should exhibit a similar trend.

Mexinox claims there is nothing "fictitious" about taking advantage of the falling interest rates by borrowing near the end of the POR - it is merely good business sense.

Additionally, Mexinox argues, petitioners have not offered any evidence to show the borrowings at issue are not arm's-length transactions with an unaffiliated lender, nor can they do so. Mexinox states it furnished complete supporting documentation for these loans in its May 8, 2002 SQR at Attachment C-35, and holds that nothing in these documents implies fictitious borrowing at either the beginning or the end of the POR.

Department's Position: We disagree with petitioners. First, we note that the interest rate cited by petitioners was not in effect during most of the POR. As shown in Attachment C-35 of Mexinox's May 8, 2002 SQR, Mexinox had short-term borrowings at other interest rates during the POR. Second, there is no evidence on the record to suggest that Mexinox's end-of-POR borrowings were in fact fictitious. On the contrary, Mexinox has provided supporting documentation for these borrowings in Attachment C-35. Therefore, we have continued to accept the credit expenses reported for Mexinox USA based on the weighted-average interest rate shown in Attachment C-35 of Mexinox's May 8, 2002 SQR.

Comment 9: Inventory Carrying Costs

Referring to Mexinox's May 8, 2002 SQR at Attachment C-37, petitioners state Mexinox reported U.S. ICCs using a dollar-denominated interest rate. Petitioners' Case Brief at 24. Petitioners argue a peso-denominated interest rate should be used instead because the record demonstrates that Mexinox in effect bore the financial burden by permitting Mexinox USA to delay payment. Petitioners contend the Department has advocated the use of a home market interest rate to calculate ICCs incurred by a U.S. subsidiary where the parent allows delayed payments, citing Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews and Termination in Part, 62 FR 11825 (March 13, 1997). Comparing Mexinox's payment terms to Mexinox USA with the actual payment terms received by Mexinox USA's customers and the average carrying period for inventory held at the Brownsville, Texas warehouse, petitioners assert it is logical to infer that Mexinox permitted Mexinox USA to make delayed payment. Therefore, petitioners hold, the Department must recalculate U.S. ICCs for the peso-denominated asset using the peso interest rate reported at Attachment B-39 of Mexinox's May 8, 2002 SQR. Petitioners' Case Brief at 25.

Petitioners argue that if the Department continues to calculate U.S. ICCs using a U.S. dollar interest rate, the Department is in effect recategorizing the inventory from a peso asset held by Mexinox to a dollar asset held by Mexinox USA. <u>Id.</u> Petitioners state that Mexinox reported ICCs based on total manufacturing cost (TCOMU) in pesos. Petitioners hold the U.S. dollar entered value (ENTVALU)

represents the proper value of the Mexinox USA dollar asset, not the peso asset reported under TCOMU. Therefore, petitioners claim, if the Department continues to use a dollar interest rate it must recalculate U.S. ICCs using entered value rather than the cost of manufacture (COM).

According to Mexinox, petitioners' claim that a peso-denominated interest rate should be used to compute U.S. ICCs is mistaken both on the law and the facts. Mexinox contends that "where the evidence shows that the foreign supplier provided its U.S. affiliate with 'delayed payment' relative to inventory carrying periods, it is not the Department's practice to simply substitute the home market interest rate for the U.S. interest rate." Respondent's Rebuttal Brief at 57-58. Citing Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 64 FR 35590, 35620 (July 1, 1999) (Antifriction Bearings), Mexinox argues that where the policy used in that case has been employed, the Department has applied the home market interest rate only to that portion of the inventory carrying period during which the affiliated exporter actually provided delayed payment to the U.S. affiliate beyond the normal payment terms.

Mexinox states the record contains no evidence it offered delayed payment to Mexinox USA. Pointing to note 2 of Mexinox USA's audited financial statements, Mexinox states its U.S. affiliate received early payment discounts on purchases from Mexinox during fiscal year 2000. Mexinox contends that neither the actual payment terms received by Mexinox USA's customers nor the average inventory carrying period for the Brownsville, Texas warehouse during the POR bears any relationship to the payment experience between itself and Mexinox USA.

Asserting it did not offer extended payment terms to Mexinox USA, Mexinox states the Department's policy as described in <u>Antifriction Bearings</u> does not pertain to the calculation of ICCs for Mexinox USA. Therefore, Mexinox argues the Department should dismiss petitioners' argument and continue to base inventory carrying costs incurred by Mexinox USA on the U.S. short-term interest rate.

Regarding petitioners' suggestion that the Department compute ICCs based on entered value, Mexinox responds it has properly valued U.S. ICCs using COM. Mexinox states it is unaware of any deviation from the Department's long-standing practice of calculating ICCs based on COM, and that petitioners have not articulate any reasons why the Department should do so in the instant review. According to Mexinox, the Department's reliance on COM is reasonable since identical products sold in the U.S. and home markets will have an identical COM. Citing Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Fresh Tomatoes From Mexico, 61 FR 56608, 56612 (November 1, 1996) (Fresh Tomatoes From Mexico) and Certain Corrosion-Resistant Carbon Steel Flat Products From Australia; Final Results of Antidumping Duty Administrative Reviews, 61 FR 14049, 14055 (March 29, 1996), Mexinox maintains the Department has dismissed calculations made on bases other than COM. In Fresh Tomatoes from Mexico, Mexinox states, the Department rejected an ICC calculation that was based on an affiliated-party sales price. Noting that entered value is based on affiliated-party sales prices serve as an

unreasonable basis for ICCs since identical products in the U.S. and home markets may bear different prices. Therefore, Mexinox urges the Department to continue basing ICCs on TCOMU for these final results.

Department's Position: We disagree with petitioners. As articulated in Antifriction Bearings at 35620:

Normally, the Department calculates U.S. inventory carrying costs using the U.S. interest rate because the affiliate bears the costs of carrying the merchandise. However, where the payment terms that an exporting company extends to its affiliate and the time that the merchandise remains in the affiliate's inventory, indicate that the exporting company bears the cost of carrying the merchandise for a portion of the time that the merchandise is in inventory, then the exporting company's short-term interest rate will be used to calculate that portion of the inventory carrying costs. ... [T]his practice was sustained by the CIT in Timken, 858 F. Supp. at 212 (citing Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Certain Components Thereof, from Japan; Final Results of Antidumping Duty Administrative Review, 56 FR 65228, 65236 (Dec. 16, 1991)).

In the instant review, the record contains no evidence that Mexinox offered delayed payment terms to Mexinox USA, or that Mexinox bore the financial burden of carrying inventory for Mexinox USA. Rather, as noted by Mexinox, the record shows that Mexinox USA earned a certain amount in early payment discounts on purchases from Mexinox during fiscal year 2000. See note 2 of Mexinox USA's audited financial statement, which is provided at Attachment A-11-B of Mexinox. Additionally, the actual payment terms received by Mexinox USA's customers and the average inventory carrying period for the Brownsville warehouse provide no evidence that Mexinox offered delayed payment to Mexinox USA. Because there is no evidence that Mexinox bore the cost of carrying inventory for any portion of time the merchandise was in Mexinox USA's inventory, we have continued to use the U.S. short-term interest rate in calculating U.S. ICCs for these final results.

We also disagree with petitioners' argument that if we continue to calculate U.S. ICCs using the U.S. short-term interest rate, we should base U.S. ICCs on entered value. It is the Department's standard practice to calculate U.S. ICCs based on COM. Adopting petitioners' proposed methodology of using entered value to calculate U.S. ICCs would result in home market and U.S. ICCs being computed on unequal bases, which would conflict with the statute. Therefore, we will continue to calculate U.S. ICCs using TCOM rather than entered value.

Cost of Production

Comment 10: Interest Expenses

According to petitioners, Mexinox based its reported financial expenses on ThyssenKrupp AG's (TKAG) income statement for the period October 1, 2000 through September 30, 2001 (FY 2001). Referring to Attachment D-13 of Mexinox's November 7, 2001 QR, petitioners note the interest expense ratio of 1.42 percent is based on total expense of 557 million euros less 125 million euros representing short-term interest income. Petitioners contend that Mexinox's response to the Department's request for additional information concerning this matter is both misleading and grossly deficient. Petitioners cite to Mexinox's June 3, 2002 SQR at 17 and Attachment D-30 and to Mexinox's July 17, 2002 SQR at Attachment D-36, and assert that little if any of the 125 million euros has been shown to represent short-term income. Referring to Mexinox's July 17, 2002 SQR at Attachment D-36, petitioners contend Mexinox's main proposed offsets are not categorized as short-term income. Petitioners also contend that Mexinox provided loose translations of the original Germanlanguage account headings to serve its interests. Petitioners assert the Department should therefore utilize the entire interest expense and make no offset for interest income. Petitioners' Case Brief at 13.

Referring to Mexinox's June 3, 2002 SQR at 18, petitioners state Mexinox also claimed it is not able to report foreign exchange losses related to TKAG's financing activities. Petitioners note Mexinox also contended that only its own accounts-payable related foreign exchange losses should be considered and not its parent's foreign exchange losses. Petitioners assert that this methodology is incorrect, and cite to Final Determination of Sales at Less Than Fair Value; Stainless Steel Sheet and Strip in Coils From Germany, 64 FR 30710, 30746 (June 8, 1999) (Stainless Steel Sheet and Strip from Germany), in which the Department dismissed the claim it should rely on the respondent's own foreign exchange and interest income rather than on the consolidated figures recorded in the parent entity's financial statements.

Petitioners maintain the Department must have data on consolidated exchange losses related to financing activities such as loans. Without such information, petitioners argue, the Department would only have information related to exchange losses incurred on accounts payable, but would be unable to account for losses pertaining to financing activities, which are determined at the consolidated level under current Department practice. Since Mexinox failed to provide information on exchange losses related to financing activities, and since Mexinox knew the Department requires this information, petitioners contend the Department should make an adverse inference based on TKAG's financial statements. Referring to pages 166 and 173 of TKAG's consolidated financial statements (which are provided at Attachment A-37-A of Mexinox's June 3, 2002 SQR), petitioners note foreign currency translation differences were included under "Other operating expenses or income," which totaled 824 million euros. Although the accompanying notes to these statements do not isolate foreign currency translations, petitioners state the accompanying notes indicate that "Other operating expenses" equal 564 million euros. Petitioners aver that currency translation expenses thus could have totaled 260 million euros (i.e., 824 minus 564). Petitioners' Case Brief at 14, citing Attachment A-37-A at page 184. Petitioners assert the Department should attribute the entire loss of 260 million euros to current portions of debt and allocate the entire amount over cost of goods sold (30,972 million euros). Id. (page 166). Petitioners maintain the resulting ratio, 0.84 percent, would provide a reasonable estimate

of foreign currency losses. Alternatively, petitioners state the Department could ask Mexinox to respond to the original question and furnish a breakdown of TKAG's consolidated exchange losses so that these costs can be included in Mexinox's cost of production.

Lastly, petitioners contend the Department should apply the revised interest expense ratio (as well as other ratios based on COM) to a packing-inclusive COM since packing is included in the ratio's denominator (cost of goods sold). Petitioners state there is no evidence that the cost of goods sold reported in financial statements excludes packing expenses; rather, they claim, the cost of goods sold generally is presented as packing-inclusive. Referring to Circular Welded Non-Alloy Steel Pipe From the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 63 FR 32833 (June 16, 1998), petitioners assert the Department has adjusted COM in other proceedings by adding packing expenses to COM before applying the packing-inclusive selling, general, and administrative and interest expense ratios.

Mexinox contends it has reported its financial expenses in conformity with the Department's established practice and therefore urges the Department to make the offset for reported short-term interest income for the final results. Mexinox argues it provided sufficient explanation of and support for the nature and amount of its claimed short-term interest income offset, and that it provided this information in a timely manner and to the best of its ability. Mexinox states its June 3, 2002 SQR at Attachment D-30 contains a breakdown of interest expense and income at the most detailed sub-account level available from TKAG, and its July 17, 2002 SQR at 9-10 contains a narrative description of each of the relevant sub-accounts. Citing proprietary information in the latter submission, Mexinox contends there is only one "trivial" element of the interest income that stems from long-term assets. The remainder of the interest income, Mexinox holds, is classifiable as short-term, including "financial assets short," income "from affiliated companies," income related to tax refunds, and "Others (mainly interest penalty received on account receivables)."

Mexinox submits petitioners do not substantively rebut the information provided in its questionnaire responses, nor do petitioners allege any of the income categories is not short-term in nature. Rather, Mexinox maintains, petitioners argue that Mexinox attempted to mislead the Department through its translations of the TKAG income accounts. Mexinox contends it neither stated nor suggested in its July 17 submission that its account descriptions were literal translations of the German-language account headings. Mexinox states it furnished additional information regarding the nature of the accounts to give context to the data being presented. Mexinox maintains this additional information is totally accurate and verifiable, and that it is a reasonable and suitable response to the Department's request. Mexinox argues that simply giving the literal translations would have been unresponsive and therefore giving additional information in this context cannot be construed as being deficient or misleading.

Referring to Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From Germany, 67 FR 3159 (January 23, 2002) (Stainless Steel Bar) and the accompanying Decision Memorandum at Comment 18, Mexinox notes the same TKAG accounts, which bore the same

account descriptions as here, were at issue. In <u>Stainless Steel Bar</u>, Mexinox states, the Department did not accept the offset for taxes on the grounds this item was not related to interest income or expense, indicating this account contained a tax refund. Mexinox contends this finding arose from a misunderstanding of the nature of this account, which reflects interest on the refunds. Mexinox notes the Department also disallowed interest on accounts receivable because such amounts were unrelated to financing. While Mexinox disagrees with that finding, it states that if the Department takes a similar approach in this case, it must also exclude the corresponding expense accounts from the denominator of the interest expense ratio for the sake of consistency. Respondent's Rebuttal Brief at 27, n.65.

Moreover, while the Department also rejected the respondents' claimed short-term interest income offsets in Stainless Steel Bar, Mexinox holds "the Department nevertheless gave the respondents credit for an estimated interest income offset based on asset values for 'cash and cash equivalents' on the consolidated TKAG balance sheet." Id. To do this, Mexinox explains, the Department identified TKAG's short-term assets and then attributed a reasonable amount of short-term interest income to those short-term assets. Mexinox contends that if the Department rejects its claimed offset, the Department must estimate short-term interest income here in a similar manner. Pointing to its June 3, 2002 SQR at Attachment A-37-A, which contains TKAG's balance sheet at page 167, Mexinox states that short-term assets consist of marketable securities and cash and cash equivalents. To determine the amount of the offset, Mexinox suggests the Department should apply the U.S. short-term interest rate to these total short-term assets.

Next, noting petitioners' citation to Stainless Steel Sheet and Strip in Coils from Germany, Mexinox argues that an adjustment based on TKAG's consolidated foreign exchange gains and losses would be inappropriate and contrary to Departmental practice. Referring to Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Butt-Weld Pipe Fittings From Malaysia, 65 FR 81825 (December 27, 2000) and the accompanying Decision Memorandum at Comment 19, Mexinox asserts the Department's established practice is to measure foreign exchange gains and losses on accounts payable related to production at the respondent level, not at the level of the consolidated parent. As stated by the Department in Notice of Final Results of Antidumping Duty Administrative Review: Canned Pineapple Fruit From Thailand, 63 FR 7392, 7401 (February 13, 1998), Mexinox holds the purpose of this adjustment is to account for exchange gains and losses related to the company's production. According to Mexinox, "[t]he focus is properly on the respondent producer, not its consolidated parent or on the experience of other entities in the corporate grouping." Respondent's Rebuttal Brief at 29 (emphasis in original). Mexinox argues that including the consolidated parent's foreign exchange gains and losses would result in double-counting, since its own foreign exchanges gains and losses on accounts payables likely are already reflected in TKAG's totals. Therefore, Mexinox urges the Department to include only those foreign exchange gains and losses incurred on accounts payable at the Mexinox level as reported.

However, Mexinox contends, if the Department decides to include net foreign exchange gains and losses incurred at the consolidated level in the interest expense calculation, the Department should not

resort to adverse facts available because the record already contains sufficient information with respect to these foreign exchange gains and losses. Mexinox states petitioners were correct in noting that the 824 million euros representing "Other operating expense or income" in TKAG's consolidated financial statements includes foreign currency gains and losses, but were incorrect in claiming that the foreign exchange portion could not be isolated. Mexinox notes that while this breakdown is not included in the audited financial statements, it acquired additional detail on other operating expenses from TKAG's Finance Department and placed this information on the record. Pointing to its July 17, 2002 SQR at Attachment D-36, page 4, Mexinox states the net foreign exchange loss incurred by TKAG is detailed therein. Mexinox states that attachment also contains the FY 2001 trial balance for TKAG for the account pertaining to foreign exchange gains and losses, along with a breakout of the exchange gains and losses incurred by TKAG's primary divisions.

Mexinox claims the information included in Attachment D-36 represents the most detailed information attainable from TKAG's financial accounting system. Noting the consolidated ThyssenKrupp group encompasses more than 800 individual companies located around the world, Mexinox argues the information available at the TKAG consolidated level is restricted to the amount of summary information provided by the layers of subsidiaries. Mexinox contends it should not be penalized for failing to furnish additional information related to TKAG's foreign exchange gains and losses where that information is not available. Mexinox avers a respondent's ability to respond to a request for information is an important factor in determining whether adverse facts available is appropriate, as specified by the statute. Pointing to American Silicon Technologies v. United States, 110 F. Supp. 2d 992, 1003 (CIT 2000), AK Steel Corp. v. United States, Slip. Op. 97-152, 1997 WL 728284 (CIT 1997), Krupp Thyssen Nirosta GmbH v. United States, Slip. Op. 01-84, 2001 WL 812167 (CIT 2001), and Nippon Steel Corp. v. United States, 146 F. Supp. 2d 835, 841 (CIT 2001), Mexinox argues the CIT has repeatedly rejected the use of adverse facts available where a party is unable to provide information. Mexinox also asserts it should not be penalized for not attempting to obtain information from each of the 800-plus companies within the ThyssenKrupp group regarding their foreign exchange gains and losses, as it would be impractical to do so given Mexinox's resources and the time permitted.

Therefore, if the Department finds it appropriate to include TKAG's foreign exchange gains and losses in the financial expense ratio, Mexinox contends the Department should utilize information on the record to make a neutral estimate of the portion of exchange gains and losses that can be ascribed reasonably to financing activity. Referring to Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Stainless Steel Bar From Italy, 66 FR 40214, 40218 (August 2, 2001), Notice of Preliminary Results and Partial Recission of Antidumping Duty Administrative Review and Intent To Revoke Antidumping Duty Order in Part: Certain Pasta From Italy, 65 FR 48467, 48470 (August 8, 2000), and Notice of Final Determination of Sales at Less Than Fair Value: Emulsion Styrene-Butadiene Rubber From the Republic of Korea, 64 FR 14865, 14866 (March 29, 1999), Mexinox claims it is not appropriate to include exchange gains and losses related to accounts receivable and non-financial payables in the interest expense calculation. To avoid double-

counting, Mexinox asserts, the Department must restrict the addition of TKAG exchange gains and losses to those related to financing (<u>i.e.</u>, exclude exchange gains and losses related to receivables or non-financing payables). Using public record information from TKAG's balance sheet, Mexinox calculates a net foreign exchange loss of 7,776,516 euros as an estimate of finance-related exchange gains and losses on the consolidated level, and suggests the Department include this amount in the interest expense calculation if it deems it necessary to include foreign exchange gains and losses at the consolidated level. Respondent's Rebuttal Brief at 31-32.

Finally, with respect to petitioners' assertion that the interest expense factor (and other expense ratios) should be applied to a packing-inclusive COM, Mexinox contends that if the Department agrees with petitioners, it could do this by applying the interest expense ratio (and other expense ratios) to the packing expenses reported for each transaction. Mexinox maintains this methodology should deal with any concerns the petitioners might have regarding the underreporting of these expenses.

Department's Position: Regarding the offset for short-term interest income, we agree in part with petitioners. In two supplemental questionnaires dated May 2 and June 28, 2002, the Department requested that Mexinox demonstrate that all interest income used to offset interest expenses in the financial expense ratio calculation qualified as short-term. Upon examining the information provided by Mexinox in its June 3 and July 17, 2002 SQRs, we found that Mexinox failed to substantiate that any of the elements making up its reported offset were in fact short-term in nature. On these grounds, we have not accepted Mexinox's reported offset to interest expenses for these final results. However, we disagree with petitioners' assertion that no offset for short-term interest is warranted, because the record shows that one of the accounts on TKAG's FY 2001 consolidated balance sheet relates to short-term interest income. Specifically, the "cash and cash equivalents" account on the consolidated balance sheet generates short-term interest income, and is related to the general operations of the company. Thus, to account for any interest income that Mexinox's parent company would have earned during the fiscal year, we calculated an estimated amount of interest income based on the "cash and cash equivalents" account on TKAG's FY 2001 consolidated balance sheet.⁵ We disagree with Mexinox that we should include the "marketable securities" account in any estimation of short-term interest income, since securities relate to the investment activities of the company and typically do not generate interest income. Therefore, we did not include "marketable securities" in our calculation of estimated short-term interest income. We also disagree with Mexinox that we should apply the U.S. short-term interest rate to total short-term assets (i.e., "cash and cash equivalents") in estimating the amount of interest income earned. Instead, we have used an interest rate that more closely reflects the lending experience of TKAG. Consistent with other cases, we have used this estimated amount of short-term interest income to offset TKAG's interest expenses. See, e.g., Stainless Steel Bar and the accompanying Issues and Decision Memorandum at Comment 18.

⁵ Contrary to petitioners' statement, Mexinox did not base its interest expense calculation on TKAG's FY 2001 data, but rather on FY 2000 data. However, we have used information from TKAG's FY 2001 financial statements to recalculate interest expenses since this fiscal period more closely corresponds with the POR.

With respect to foreign exchange gains and losses, the Department's established practice is to include in the calculation of COP and CV foreign-exchange gains and losses resulting from transactions related to a respondent's manufacturing activities (e.g., raw material purchases) as well as foreign-exchange gains and losses generated from financial transactions (i.e., debt). See, e.g., Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, 64 FR 38756, 38786 (July 19, 1999). We note Mexinox has reported an amount attributable to foreign exchange gains and losses on manufacturing activities under the field FOREX. However, Mexinox has not reported foreign-exchange gains and losses incurred on financing activities in its COP database. Since it is the Department's policy to base financial expenses on the highest level of consolidation, it follows that foreign exchange gains and losses on financing activities should be based on the highest level of consolidation. Because Mexinox has not included foreign-exchange gains and losses incurred on financing activities in its calculation of interest expenses, and because it is the Department's practice to base interest expenses on the highest level of consolidation, we disagree with Mexinox that it would be contrary to the Department's practice to adjust interest expenses to include foreign-exchange gains and losses incurred by TKAG.

Mexinox reported "other operating expenses" totaling 824 million euros on its consolidated income statement for FY 2001. TKAG's FY 2001 consolidated financial statement establishes that 564 million euros relate to goodwill amortization, loss on the disposal of property, plant, equipment and intangible assets, restructuring charges, provisions for accruals, and non-customer related research activities. We disagree with petitioners' assertion that attributing the remaining 260 million euros to foreign exchange losses is warranted in this case. According to Attachment D-36 of Mexinox's July 17, 2002 SQR, TKAG's net foreign-exchange gains and losses for FY 2001 equaled 22 million euros. We note that Mexinox provided at page 32 of its rebuttal brief a breakdown of those 22 million euros based on data from its FY 2001 consolidated balance statement, asserting that 7,766,516 euros constituted a reasonable estimate of TKAG's foreign exchange losses for FY 2001. Because Mexinox first presented this to the Department in its rebuttal brief and not in its questionnaire response or in a supplemental questionnaire response, we had no means by which to confirm the validity of this information in a supplemental questionnaire. Without such clarification, the record contains no evidence that the distribution of foreign exchange losses as shown in Mexinox's rebuttal brief is a reliable means on which to determine TKAG's foreign-exchange losses for the fiscal year. Therefore, for these final results, we have adjusted Mexinox's reported interest expenses by including 22 million euros representing foreign exchange losses.

Finally, we note that in the preliminary results we understated interest expenses and G&A expenses by erroneously multiplying a packing-exclusive COM by expense ratios that were calculated based on a packing-inclusive amount. Therefore, for these final results we have corrected this understatement by subtracting packing expenses from the interest expense and G&A expense denominators. To derive a revised denominator for G&A expenses, we obtained Mexinox's FY 2000 packing expenses from its June 3, 2002 SQR at Attachment D-20 (COM reconciliation) and deducted those expenses from

COGS. To revise the interest expense denominator, since the record contains no information regarding TKAG's fiscal-year packing expenses, we estimated an amount for packing based on the ratio of Mexinox's packing costs to Mexinox's COGS, and then deducted this estimated amount from TKAG's COGS.

<u>See</u> the Department's Final Analysis Memorandum, dated February 3, 2003, for further details regarding the recalculation of interest expenses.

Comment 11: General & Administrative Expenses

Citing Mexinox's June 3, 2002 SQR at Attachment D-29 and its November 7, 2001 QR at Attachment A-11-A, petitioners contend the Department should increase the numerator of Mexinox's general and administrative (G&A) expense ratio to include expenses incurred on behalf of Mexinox Trading and employees' statutory profit sharing. Referring to the 1999-2000 Final Results and the accompanying Issues and Decision Memorandum at Comment 9, petitioners state that the Department included those expenses in G&A in the first administrative review and should follow the same methodology for the instant review. Petitioners also argue the Department should remove income and expenses related to Mexinox's Tlalnepantla warehouse from G&A expenses, stating that income from distribution operations is unrelated to production. Petitioners' Case Brief at 15-16.

In addition, petitioners hold, in its revised cost reconciliation worksheet Mexinox listed several expenses as not being part of the COM, referring to Mexinox's June 3, 2002 SQR at Attachment D-20. Petitioners assert the Department should include these costs in COM since they all relate to the production of subject merchandise.

Noting the Department included expenses incurred by Mexinox on behalf of Mexinox Trading and expenses associated with employees' statutory profit sharing in G&A in the 1999-2000 Final Results, Mexinox states "it had no intention of 'flouting' the Department's findings on this issue." Respondent's Rebuttal Brief at 33. Mexinox asserts it disagrees with the Department's handling of those expenses in the 1999-2000 Final Results and urges the Department to accept its reported G&A for these final results.

With respect to expenses incurred on behalf of Mexinox Trading, Mexinox contends it properly removed these expenses from G&A because: (a) they constitute selling expenses and (b) they are incurred on behalf of, and for the benefit of, Mexinox Trading, not Mexinox. Respondent's Rebuttal Brief at 33. According to Mexinox, these expenses indisputably consist of salaries for personnel involved in G&A functions supporting Mexinox Trading's operations. Mexinox claims these persons work solely on matters related to Mexinox Trading and do not support Mexinox's operations. As the Department verified in the last administrative review, Mexinox argues, Mexinox Trading is a separate entity engaged mainly in the purchase and resale of finished stainless steel products that possesses no production capabilities. Mexinox asserts that since "Mexinox Trading is a resale operation, all

overhead expenses incurred by Mexinox Trading, including the expenses at issue that are booked by Mexinox, by definition support this <u>sales</u> function." <u>Id.</u> at 33-34 (emphasis in original). Therefore, Mexinox holds, these expenses are properly categorized as selling expenses since they are incurred on Mexinox Trading's behalf.

Mexinox contends this categorization of selling expenses is in accordance with the Department's established practice, which is to deem all expenses incurred by affiliated resellers to be selling expenses, even if those expenses are categorized as selling, general, or administrative expenses. Mexinox cites to Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From Thailand, 66 FR 49622 (September 28, 2001) (Hot-Rolled from Thailand) and the accompanying Issues and Decision Memorandum at Comment 10 and Certain Preserved Mushrooms From Indonesia: Final Results of Antidumping Duty Administrative Review, 66 FR 36754 (July 13, 2001) (Mushrooms from Indonesia) and the accompanying Issues and Decision Memorandum at Comment 4. Citing the Original Investigation at 30818, Mexinox states that the Department found that "expenses incurred on behalf of the selling subsidiaries should not be included in the calculation of the G&A expense ratio" and therefore removed them from the G&A expense calculation.

Mexinox asserts the Department erroneously made a different conclusion in the 1999-2000 Final Results. Citing the 1999-2000 Final Results and the accompanying Issues and Decision Memorandum at Comment 9, Mexinox states the Department made its determination on the grounds that the expenses at issue constituted "G&A expenses, not selling expenses." However, Mexinox contends, under the Department's established practice "expenses that are otherwise classifiable as 'general and administrative' expenses are nevertheless treated as selling expenses for antidumping reporting purposes if the entity in question is a selling entity." Respondent's Rebuttal Brief at 35. Mexinox holds that simply noting the expenses at issue are "general and administrative" does not signify they should be treated as such for antidumping reporting purposes. Therefore, Mexinox argues the Department should continue excluding these expenses from its reported G&A factor.

With respect to employees' statutory profit sharing, Mexinox notes the Department also included this item in G&A in the 1999-2000 Final Results. Mexinox holds it is wrong from an accounting viewpoint and distortive of cost reporting to consider such "below the line" amounts as G&A expenses, and therefore exhorts the Department to reconsider its position for these final results. Respondent's Rebuttal Brief at 35. Referring to note 14 of its audited financial statements, which are included in its October 12, 2001 QR at Attachment A-11-A, Mexinox maintains the item at issue is not a period expense. Mexinox argues this item is not an expense incurred in connection with the production of subject merchandise (or any other company operations), but rather is similar to dividend distributions or income tax payments, neither of which is included in COP or CV. Citing High Information Content Flat Panel Displays and Display Glass Therefor From Japan: Final Determination; Rescission of Investigation and Partial Dismissal of Petition, 56 FR 32376, 32932 (July 16, 1991), Final Results of Antidumping Duty Administrative Review; Color Picture Tubes from Japan, 55 FR 37915, 37925 (September 14, 1990), and Television Receivers, Monochrome and Color, From Japan; Final Results

of Antidumping Duty Administrative Review, 54 FR 13917, 13928 (April 6, 1989), Mexinox contends the Department's established practice is to exclude dividend distributions or income tax payments from the cost calculation because they relate to the level of income earned by a corporation, not the expenses themselves.

Regarding revenue and expenses associated with the Tlalnepantla warehouse, Mexinox claims these amounts do not represent income from Mexinox's distribution operations. Instead, Mexinox argues, these amounts pertain to the portion of the warehouse that is not used by Mexinox for its distribution operations. Respondent's Rebuttal Brief at 36. Mexinox states it leased the unutilized parts of the warehouse to other entities; therefore, Mexinox contends, it included these amounts in the numerator of the G&A ratio in order to capture fully the revenues and expenses realized by Mexinox on the leased portion of the warehouse. Unlike the expenses incurred on Mexinox Trading's behalf, Mexinox asserts, the income and expenses at issue here benefit Mexinox, not its affiliated reseller. Therefore, Mexinox argues the revenue and expenses associated with the Tlalnepantla warehouse are related to Mexinox's general operations as a whole and are properly included in its reported G&A expenses.

Finally, with respect to certain reconciling items that were excluded from COM, Mexinox contends the Department examined these items closely during the verification conducted in the 1999-2000 administrative review and found no basis for adjusting Mexinox's reported costs for the 1999-2000 Final Results. According to Mexinox, the facts remain unchanged in the instant review and petitioners have not furnished an explanation as to why these items should be treated differently. Mexinox asserts each item has been properly excluded from COM and therefore the Department should continue to exclude them from COM.

Mexinox argues that petitioners have identified only those items whose inclusion would increase its reported costs, and are reticent with respect to items that would decrease its reported costs. Mexinox maintains the excluded items at issue are identical to those reviewed and accepted by the Department in the last administrative review and argues that petitioners raised no objections to these items until their Case Brief. Noting the cost reconciliation for the current review was first placed on the record on November 20, 2001 and was revised in its June 3, 2002 SQR at Attachment D-20, Mexinox avers that introducing deficiency comments at the briefing stage of a review is unhelpful to the Department and is not fair to respondents.

Mexinox then discusses each of the reconciling items referenced by petitioners. Mexinox states it excluded "Cost of Scrap Sales" and "Cost of Stock Strip Sales" from COM because these pertain to the cost of goods sold for scrap and stock strip, respectively, not to production costs. Mexinox holds that total production costs for both items have already been included in the "Cost of Production" section of its cost reconciliation. Specifically, Mexinox notes scrap material costs are reclassified from raw materials to scrap under the account "Scrap Generation," which represents the recoverable value of scrap generated during production. Mexinox holds it does not allocate processing costs to scrap generated during production, as all processing costs are absorbed by the production of first and second

quality material. According to Mexinox, the recoverable value of scrap is used to record the inventory value of scrap, which in turn is used to record the cost of goods sold for scrap. Mexinox claims the difference between the scrap generation amount and the cost of scrap sales is due to timing differences. Mexinox asserts that including "Cost of Scrap Sales" in COM would cancel out the scrap recovery value and thus preclude Mexinox from receiving an offset to its costs for the sale of scrap generated during the production process. Likewise, Mexinox notes that the raw material and processing costs of stock strip are reflected under "Raw Material Purchases" and "Transformation Expenses," respectively (i.e., under "Cost of Production"). In the normal course of business, Mexinox states, it decreases the inventory value (but not the production cost) of stock strip and accounts for this reduction under "Stock Strip Devaluation." Mexinox contends it has not reduced COM by "Cost of Stock Strip Sales" because this amount represents the inventory cost for stock strip material at the time of sale, not at the time of production. Thus, Mexinox holds, including the cost of stock strip sales in COM would result in double-counting, as the full cost of production for stock strips is already included in COM. In a footnote, Mexinox cites the cost verification report from the 1999-2000 administrative review, in which the Department noted at 11 that "[t]he cost of stock strip and scrap sales ... were removed because they were already included in production cost."

Next, Mexinox states that "Maquila Cost" pertains to the cost of goods sold for tolled material, and "Maquila Transformation Expenses" reflects the production costs related to toll-processed material. Since tolled material is not subject merchandise, Mexinox contends, it did not include the production cost or the cost of goods sold pertaining to this material in its reported costs.

Noting the Department's questionnaire requires production costs to be reported based on actual costs incurred during the POR, Mexinox maintains it excluded "Provision for Sludge Confinement" from its reported costs because this item pertains to production expenses incurred prior to the original investigation. Mexinox argues this is in keeping with the Department's treatment of this item in the last review, and cites the cost verification report from the 1999-2000 administrative review, in which the Department noted "[t]he provision for sludge confinement ... was excluded because it related to pre-POR production."

With respect to "Extraordinary Operations," Mexinox asserts it examined the specific entries in this account and included each entry relevant to the POR production of cold-rolled stainless steel in its reported costs as raw material, scrap, and scrap recovery. Mexinox contends it correctly excluded those entries unrelated to POR production from it reported costs, and therefore these amounts should not be included in its reported costs.

Lastly, Mexinox argues that "Scrap & Stock Strip Inventory Devaluation" is unrelated to the production of subject merchandise. Mexinox contends this item reflects inventory write-downs on material and that the full production costs for scrap and stock strip material have already been included in its reported costs.

Department's Position: We agree with Mexinox and petitioners in part. First, we agree with Mexinox that expenses incurred on behalf of Mexinox Trading are properly excluded from the calculation of the G&A ratio, as it is the Department's practice to treat all expenses incurred by affiliated resellers as selling expenses. See, e.g., Hot-Rolled from Thailand and the accompanying Issues and Decision Memorandum at Comment 10 and Mushrooms from Indonesia and the accompanying Issues and Decision Memorandum at Comment 4; see also the Original Investigation at 30818. Therefore, we have continued to exclude expenses incurred by Mexinox on Mexinox Trading's behalf from the numerator of the G&A expense ratio.

With respect to employees' statutory profit sharing, we agree with petitioners that these expenses should be included in G&A. The Department's established practice is to include such expenses in the calculation of COP and CV. See, e.g., Porcelain-on-Steel Cookware From Mexico: Notice of Final Results of Antidumping Duty Administrative Review, 62 FR 25908, 25914 (May 12, 1997) and the 1999-2000 Final Results and the accompanying Issues and Decision Memorandum at Comment 9. Because this item relates to the general operations of the company and it is an expense recognized within the POR, it should be included in Mexinox's G&A expenses. Therefore, we have adjusted Mexinox's reported G&A expenses to include these expenses.

Regarding expenses and income related to the Tlalnepantla warehouse, we disagree with petitioners that these should be removed from Mexinox's reported G&A expenses. The Department does not require G&A expenses to relate only to the production of subject merchandise but rather considers those expenses related to the general operations of the company as a whole. The record indicates that Mexinox utilizes a portion of the Tlalnepantla warehouse for its own operations and rents the remaining portion to four other companies. See Mexinox's November 7, 2001 QR at B-28. Mexinox's home market sales listing, in turn, reflects the freight, storage, and personnel expenses related to sales made from the Tlalnepantla warehouse, as well as depreciation allocated to the portion of the warehouse used by Mexinox. Mexinox therefore included in G&A expenses the depreciation allocated to the rented portion of the warehouse. Mexinox also included in G&A an amount for Tlalnepantla warehouse indirect expenses. As indicated in its May 8, 2002 SQR at S1-53, Mexinox did not allocate Tlalnepantla warehouse general expenses between its own operations and the operations of its tenants. Thus, it follows that Mexinox included in G&A expenses an amount representing indirect expenses. Because G&A expenses relate to the general operations of a company as a whole and the Tlalnepantla warehouse constitutes part of Mexinox's general operations, and since expenses related to the rented portion of the Tlalnepantla warehouse are included in G&A, it is appropriate that Mexinox has included rental income from the rented portion of the warehouse in G&A. As a result, we have not removed the expenses and income related to the Tlalnepantla warehouse from G&A expenses.

Finally, with respect to certain reconciling items that Mexinox excluded from COM, we disagree with

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⁶ We note that our conclusion in the <u>1999-2000 Final Results</u> to include these expenses in the G&A ratio was erroneous.

petitioners that we should include these items in either COM or G&A. We have examined the record and have found no record evidence demonstrating these items relate to the general operations of the company or to the production of subject merchandise. Accordingly, for these final results we have made no adjustments to G&A for these reconciling items.

<u>See</u> the Department's Final Analysis Memorandum, dated February 3, 2003, for the calculation of revised G&A expenses.

Comment 12: Whether to Include Services Supplied By Mexinox USA in Material Costs

Petitioners submit the Department should include, either in material costs or G&A, the full amount of all expenses incurred by Mexinox USA in connection with its purchase of hotbands on Mexinox's behalf. Citing Mexinox's May 8, 2002 SQR at Attachment C-36, petitioners state Mexinox USA's ISE ratio for all sales, including sales to Mexinox, equaled a certain percentage. Petitioners contend an upward adjustment should be made to reflect the difference between the Mexinox USA ISE ratio and the ratio discussed in Mexinox's June 3, 2002 SQR at 16.

Mexinox responds an upward adjustment to material costs or G&A for services provided by Mexinox USA is unwarranted. Mexinox contends petitioners' comparison between the two ratios is flawed because considerable timing differences can exist between when the POR ISEs were incurred and when the hotband was invoiced to Mexinox (<u>i.e.</u>, when the service fee was charged). Since the two ratios cannot be expected to be identical at any particular point in time, Mexinox holds, the Department should not be concerned that they are not identical in this case. Nonetheless, Mexinox argues, if the Department finds it necessary to adjust for the difference between the two ratios, it should do so by including in G&A an amount reflecting the estimated dollar value of the difference in selling expenses (<u>i.e.</u>, the difference that arises as a result of applying the two ratios).

Department's Position: We disagree with petitioners' assertion that an upward adjustment to Mexinox's reported costs is warranted for services provided by Mexinox USA. It is irrelevant that the service fee charged by Mexinox USA in connection with purchases of hotband on Mexinox's behalf is less than the ISE ratio calculated for Mexinox USA (INDIRSU), since the sale of hotbands from Mexinox USA to Mexinox represents an intercompany transfer. We do note, however, that the inclusion of Mexinox USA's raw material sales to Mexinox in the denominator of INDIRSU is inappropriate, and therefore we have deducted raw material sales from the denominator of INDIRSU for these final results. For further discussion of this issue, see Comment 6 of this memorandum.

Comment 13: Scrap Recovery Values

Based on data contained in Mexinox's June 3, 2002 SQR at Attachment D-21, petitioners calculate the average prices for Mexinox's POR scrap sales. Then, referring to Attachments D-33 and D-35 of the June 3, 2002 SQR, petitioners assert that Mexinox's estimated scrap recovery values for 2000, which

it used to report material costs, equaled a different amount. Furthermore, citing Attachment D-35, petitioners claim that Mexinox used one exchange rate to convert raw material input prices but a different one to convert scrap. According to petitioners, the differences between actual scrap revenues and estimated scrap recovery values, as well as the differences in the exchange rates used, demonstrate Mexinox has overstated scrap recovery values in reporting material costs. Referring to Mexinox's June 3, 2002 SQR at Attachment D-21, petitioners claim the overstatement appears to stem partly from the inclusion of scrap revenue from sales of third-quality merchandise. Petitioners hold that sales of third-quality merchandise obviously did not constitute scrap and therefore the associated revenue cannot be used to offset costs.

Petitioners note the "RMAT" field in Mexinox's cost of production (COP) database reflects the perunit scrap recovery on raw materials for each control number (CONNUM). Petitioners argue the Department should adjust RMAT using two ratios: (1) the ratio of actual scrap revenues to estimated scrap recovery values, and (2) the ratio of the exchange rate used in converting scrap recovery prices to the exchange rate used in converting raw material prices. Petitioners propose the Department use one set of ratios for austenitic products and a different set for ferritic products.

Pointing to Mexinox's June 3, 2002 SQR at 8, petitioners state Mexinox accounted for the difference between actual and estimated scrap recovery prices by applying the cost variance. Petitioners argue the "ARMAT" field, which Mexinox used to report this variance, does not reflect the entire variance between the actual and estimated scrap recovery values. Not only is ARMAT understated, petitioners contend, but the values reported in ARMAT do not recognize the difference in scrap recovery values for austenitic and ferritic products.

Mexinox responds that petitioners' claim "is based on a flawed and meaningless comparison between values for different products, different time periods, and irrelevant exchange rate adjustments." Respondent's Rebuttal Brief at 44. Mexinox holds it based its reported scrap recovery values on its normal cost accounting system and the calculation methodologies used in the normal course of business to compile its audited financial statements in conformity with Mexican GAAP. Citing section 773(f)(1)(A) of the Tariff Act, Mexinox contends a respondent's costs are generally calculated based on the books and records maintained in the normal course of business in accordance with local GAAP, if those costs reasonably reflect the costs related to production. Mexinox states that is the case in the instant review.

Mexinox contends Attachment D-21 of its June 3, 2002 SQR does not reflect all of its POR scrap sales and thus is not a good source for petitioners' calculations. Mexinox holds it provided these data to show that it sold scrap to affiliate ThyssenKrupp Acciai Speciali Terni S.p.A (AST) at arm's-length prices. Since it only sold fourth-quality scrap to AST, Mexinox argues, Attachment D-21 only reflects sales of fourth-quality scrap. Thus, Mexinox maintains, petitioners' calculated average scrap sales prices understate the actual scrap revenues obtained during the POR.

With respect to petitioners' assertion that third quality material does not constitute scrap, Mexinox contends that assertion is incorrect and completely uncorroborated. According to Mexinox, the Department saw at the verification conducted for the 1999-2000 administrative review that 'both the third quality and fourth quality material held in its scrap yards are obviously 'scrap' and has always been treated as such in the normal course of business for production, sales, and accounting purposes." Respondent's Rebuttal Brief at 45, n.105 (emphasis in original). Mexinox holds petitioners' approach is especially flawed because Attachment D-37 of its July 17, 2002 SQR shows that in the normal course of business it calculates estimated scrap recovery values using both third- and fourth-quality scrap. Mexinox argues both third- and fourth-quality scrap contribute to reported costs through the yield loss that occurs during the production of individual packages, therefore making it appropriate to include revenue from sales of both third- and fourth-quality scrap in an estimated (and later actualized) scrap recovery value. Mexinox contends that eliminating the higher-value scrap from the calculation of scrap recovery values is illogical and produces an artificial gap between estimated and actual scrap prices.

In addition, Mexinox asserts, petitioners have only compared their calculated scrap sales prices to the estimated scrap recovery values used during fiscal year 2000, which pertain only to the first half of the POR. Mexinox states petitioners ignored the estimated recovery values for fiscal year 2001 that are shown in Attachment D-33 of its July 17, 2002 SQR.

With respect to petitioners' argument regarding exchange rates, Mexinox claims this argument is misleading and irrelevant. According to Mexinox, petitioners incorrectly state Mexinox has used different exchange rates to value raw materials and scrap. Mexinox holds Attachment D-35 of its June 3, 2002 SQR clearly demonstrates the same exchange rate was used to determine raw material costs and the yielded portion of raw materials. However, Mexinox notes, to calculate estimated scrap recovery values it utilized the exchange rate in effect on the date on which the estimated recovery values were determined, referring to its June 3, 2002 SQR at 8. Mexinox states the estimated value is later actualized for reporting purposes by applying the variance between the estimated recovery value and the actual recovery value calculated at the end of the fiscal year.

Once the flaws in petitioners' calculations are considered, Mexinox asserts, it is apparent there is no substance to the claim that Mexinox's normal cost accounting overstates scrap recovery values. Mexinox contends its reported scrap recovery values are properly based on prior year scrap sales prices that are subsequently adjusted at year end (and for antidumping reporting purposes) using the actual prices booked for scrap sales. Therefore, Mexinox argues, no adjustments are necessary for these final results.

Department's Position: We disagree with petitioners' assertion that the Department should make an

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⁷ Mexinox states that third-quality scrap typically consists of larger crushed and twisted pieces of steel while fourth-quality scrap generally consists of side trimmings, shavings, and other small pieces.

adjustment to Mexinox's reported scrap recovery values. Petitioners suggest the average prices Mexinox would have received on its POR sales of scrap using data contained in Attachment D-21 of Mexinox's June 3, 2002 SQR. However, a comparison of Attachment D-21 to Attachment D-37 of Mexinox's July 17, 2002 SQR demonstrates that Mexinox's estimated recovery values reflect two different categories of scrap, while petitioners' calculation reflects only one category of scrap: the lower-priced category. Although petitioners assert the material Mexinox has labeled as "third-quality" is not scrap, there is no evidence in either Attachment D-21 or Attachment D-37 or elsewhere on the record suggesting that this material constitutes anything other than scrap. In addition, petitioners' calculation compares actual scrap recovery values for the entire POR to estimated scrap recovery values that were in effect for only six months of the POR. Thus, it would be inaccurate to substitute petitioners' calculated values for Mexinox's estimated scrap recovery values.

In addition, the Department's long-standing practice (now codified at section 773(f)(1)(A) of the Tariff Act) is to rely on a company's normal books and records if such records are in accordance with home country generally accepted accounting principles (GAAP) and reasonably reflect the costs associated with production of the merchandise. See, e.g., Notice of Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Antidumping Duty Order: Brass Sheet and Strip From the Netherlands, 65 FR 742, 749 (January 6, 2000). The scrap recovery values reported under RMAT are based on the values recorded in Mexinox's normal cost accounting system, which reflects estimated recovery values for scrap. The ARMAT field, in turn, reflects the variance between the scrap recovery values recorded in Mexinox's cost accounting system and those booked in its financial accounting system. The record demonstrates that Mexinox's financial accounting system reflects the actual revenue earned on sales of scrap. See, e.g., Mexinox's June 3, 2002 SQR at 19 and its COM reconciliation at Attachment D-20. Since the ARMAT field effectively captures the difference between estimated recovery values and the actual revenue earned by Mexinox on scrap sales, as recorded in its normal books and records, we find no reason to make an adjustment to Mexinox's reported scrap recovery values.

Further, since the variance reported in ARMAT is reflective of Mexinox's normal books and records, we find that it effectively reflects the difference between estimated recovery values and actual revenues for both austenitic and ferritic products. While in theory two separate variances could be computed for austenitic and ferritic scrap material, the record does not contain any information that would allow us to perform such a calculation. It also bears noting that Mexinox's other reported variances (e.g., raw material costs and yield loss) do not differentiate between austenitic and ferritic products.

Finally, with respect to the argument that an adjustment should be made to account for the difference in exchange rates used to convert raw materials and scrap recovery values, we disagree with petitioners. The record shows that Mexinox valued raw materials and the yielded portion of raw materials using the exchange rate in effect at the end of the month in which the merchandise was packed, and that it valued estimated scrap recovery values using the exchange rate in effect on the date on which the estimated recovery values were determined. See, e.g., Attachments

D-15 and D-16 of Mexinox's November 7, 2001 QR and Attachments D-32 and D-34 of its June 3, 2002 SQR. Because Mexinox utilized this conversion methodology in its normal cost accounting system, and because there is no evidence suggesting that Mexinox's calculation is distortive, no adjustment is necessary for these final results.

Further Manufacturing

Comment 14: Value-Added Costs by Ken-Mac

Referring to proprietary information contained in Mexinox's June 3, 2002 SQR at 31 and 32, petitioners assert Ken-Mac's revised processing cost schedule should be rejected. For instance, noting Mexinox's argument that the processing cost schedule is valid because it was tested thoroughly at the last verification of Ken-Mac, petitioners argue that verification pertained to costs for the period January 1999 through June 2000.

According to petitioners, the Department's practice in other administrative reviews has been to utilize pre-petition cost allocation factors in order to guard against manipulation by respondents. Petitioners cite to Notice of Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination Not To Revoke Order in Part: Canned Pineapple Fruit From Thailand, 65 FR 48450 (August 8, 2000) (Pineapple from Thailand). Petitioners claim that "[e]ven if a respondent can provide some explanation for a change in cost allocations, it is best to adhere to a predictable standard of pre-existing allocation factors so that the Department does not have to try to evaluate case-by-case revisions." Petitioners' Case Brief at 26-27. Petitioners contend any revisions that transpire in the context of an ongoing antidumping administrative review must be dealt with in that context. Nevertheless, petitioners maintain, the revised cost allocations "are totally unsupported and appear results-oriented." Id. at 27. Since the revised value-added costs are understated, petitioners argue, the Department should amend these costs to reflect allocations based on the original processing schedule.

Asserting petitioners' arguments for rejecting the revised processing schedule should be dismissed, Mexinox responds that petitioners' claims are either inaccurate or bear no relation to the validity of the process schedule. Rather, Mexinox maintains, the revised processing schedule "remains a valid and reliable basis for cost allocations." Respondent's Rebuttal Brief at 61. Therefore, Mexinox urges the Department to use Ken-Mac's further-processing costs as reported for these final results.

Mexinox argues petitioners' theory disregards the fact that Ken-Mac did not generate the processing schedule for antidumping purposes. Mexinox contends Ken-Mac developed the process schedule prior to the filing of the antidumping petition in order to make reasonable estimates of profits on sales so that, in turn, it can calculate commission payments. Referring to its November 7, 2001 QR at KME-10, Mexinox states it revised its processing schedule in the normal course of business.

Mexinox argues it is illogical to suggest that Ken-Mac would intentionally skew the revised schedule to understate the cost of further-processing stainless steel materials and as a result pay increased commissions to its salesmen. According to Mexinox, the losses would far outweigh the gains if Ken-Mac were trying to construct its process schedule in this manner. Mexinox states that a lower further-processing adjustment on Ken-Mac's resales of subject merchandise during the POR would be canceled by the additional commissions Ken-Mac would have to pay based on the increased profit received on sales of non-subject stainless steel originating from both Mexinox and other sources. Referring to its July 17, 2002 SQR at Attachment A-39-D, Mexinox notes that Ken-Mac's resales of Mexinox subject material accounted for only a certain percentage of Ken-Mac's total POR sales. Of that percentage, Mexinox notes an even smaller percentage of subject merchandise was affected because the revised processing schedule only covers merchandise further-processed during certain months of the POR. Mexinox contends petitioners' claim that there are incentives for skewing Ken-Mac's processing schedule is not plausible and the Department should not accept speculation that is based on faulty logic.

In addition, Mexinox asserts, certain circumstances related to the revision of the processing schedule are not proof of manipulation or grounds for dismissing the reported costs. Mexinox states that Ken-Mac utilized process schedules in the normal course of business well before the filing of the antidumping petition. Referring to its November 7, 2001 QR at KME-10, Mexinox notes that management periodically revises the processing schedules "to reflect better information, new equipment and/or facilities, and other intervening changes in operations." Respondent's Rebuttal Brief at 62. Mexinox relates the process schedule to standard costs that are revised periodically to reflect a company's current cost experience more precisely. Mexinox contends the Department cannot anticipate that a company will cease making such periodic revisions simply because an antidumping case has been filed against an affiliated supplier for a small amount of the company's total raw materials. Mexinox further asserts that petitioners' reference to Pineapple from Thailand is incorrect. Mexinox states the issue in that case was how to apportion costs between "joint products" with substantially different values and qualitative features. According to Mexinox, prior to the filing of the antidumping petition several of the respondents in Pineapple from Thailand allocated costs between joint products using net realizable value, but after the antidumping order went into effect they shifted to a weight-based allocation. Mexinox states the Department dismissed the latter methodology as distortive and in doing so, noted it considers whether a company used a particular allocation methodology historically. Citing Pineapple from Thailand at 48453, Mexinox contends the Department rejected the weight-based allocations because they did not reasonably reflect production costs, not because the methodology was adopted after the antidumping petition.

Mexinox also disagrees with petitioners' contention that the revisions pertained only to stainless steel products. Pointing to its June 3, 2002 SQR at 32, n.8, Mexinox notes the particular revisions that were made to the process schedule, stating that both aluminum and non-aluminum costs were revised.

Lastly, Mexinox contends that the Department's decision not to verify Ken-Mac's revised process schedule does not render that process schedule unreasonable. Mexinox notes that during verifications of past proceedings of this case the Department examined and tested the process schedule that predated it and found it to be reasonable. Mexinox contends petitioners have not pointed to any changes in the revised process schedule that reflect errors or result in distorted costs, nor have they provided any evidence to support their argument that Ken-Mac updated its process schedule in a results-oriented manner to reduce the Department's value-added calculations.

Department's Position: We disagree with petitioners' assertion that we should disregard Ken-Mac's revised processing cost schedule and base all of Ken-Mac's further manufacturing costs on its original processing cost schedule. First, we note the Department's determination in Pineapple from Thailand is irrelevant to the instant review, as Pineapple from Thailand dealt with the rejection of a specific allocation methodology that did not reasonably reflect production costs. Second, question I.B. of section E of the Department's standard questionnaire asks respondents to report further manufacturing costs "based on the actual costs incurred by your U.S. affiliate during the period of review, as recorded under its normal accounting system." Because of the manner in which Ken-Mac records processing costs in the normal course of business, it used its schedule of estimated processing charges to report further manufacturing costs to the Department. See Mexinox's November 7, 2001 QR at KME-9 through KME-12. Depending on which was relevant, it used either the original or revised processing cost schedule to report these data. Since we require respondents to report costs that are as current as possible, and since there is no evidence on the record to suggest the revised stainless product costs were contrived, for these final results we find no reason to disregard costs based on the revised processing cost schedule.

Assessment Rates

Comment 15: Assessment Rate Methodology

Mexinox argues the Department should recalculate the assessment rate to account for known entries of non-subject merchandise that were physically within the scope of the order at the time of entry but were first sold (after importation) to customers outside the United States.

Citing the 1999-2000 Final Results and the accompanying Issues and Decision Memorandum at Comment 15, Mexinox contends the Department properly concluded in that review that "subject merchandise sold to unaffiliated parties outside the United States is not subject to antidumping duties" (emphasis added by respondent). Mexinox holds this determination was in keeping with Torrington Co. v. United States, 82 F.3d 1039, 1047 (Fed. Cir. 1996) (Torrington), in which the CIT found that "where there is no U.S. price for an entry which is subsequently re-exported, {the Department's}decision not to impose antidumping duties on the entry is consistent with the basic purpose of the antidumping laws." Respondent's Case Brief at 4, citing Comment 15 of the Issues and Decision Memorandum accompanying the 1999-2000 Final Results. Referring to Certain Internal-

Combustion Industrial Forklift Trucks from Japan; Final Results of Antidumping Duty Administrative Review, 62 FR 34216 (June 25, 1997) and Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Finding, 61 FR 57629 (November 7, 1996), Mexinox maintains the Department's practice has been to include in the denominator of the assessment rate the entered value of merchandise sold to unaffiliated parties outside the United States. Mexinox states the Department's analysis in those cases is equally relevant in the instant review.

Mexinox asserts there are two categories of non-subject entries for which the Department must make an adjustment in this review. Mexinox states it has reported data for all of these transactions in its U.S. sales listing, and that all can be identified by the code "N2" in the field SUBJECTU. According to Mexinox, the first category involves merchandise entered for consumption during the current period of review ("POR2") that was first sold to customers outside the United States during POR2 or after the completion of POR2. Mexinox argues the Department must add the total entered value of these sales to the denominator in the assessment rate calculation in order to avoid collecting antidumping duties on these non-subject sales. Mexinox indicates this approach is identical to that utilized by the Department in the 1999-2000 Final Results.

The second category of non-subject entries, Mexinox argues, consists of merchandise entered for consumption during the most recently-completed period of review ("POR1") but sold to customers outside the United States after the completion of POR1. Mexinox contends the disposition of these entries was not known before the completion of POR1; therefore, it could not request any adjustment for these sales during the course of that review period. Mexinox states it forewarned the Department of this scenario in its POR1 case brief, noting it would have no alternative but to seek an adjustment in subsequent review periods when the disposition of this merchandise became known. Mexinox holds the disposition of this merchandise is now known, but since the Department has issued instructions to the U.S. Customs Service to liquidate all POR1 entries, antidumping duties have already been assessed on these sales. However, for the same reasons the Department adjusted the assessment rate for Mexinox in the 1999-2000 Final Results, and for the same reasons antidumping duties cannot be collected on non-subject products entered during POR2, Mexinox asserts it would not be lawful for the Department to retain the antidumping duties collected on POR1 non-subject entries. Since these POR1 entries were first sold to customers outside the U.S. after the completion of the first review period, Mexinox argues the current review period provides the first opportunity for it to request an adjustment for these entries. Mexinox maintains that if the Department does not make such an adjustment in the instant review, it will be unable to seek compensation for the improper assessment of antidumping duties on non-subject merchandise that entered during POR1. Mexinox therefore proposes the Department remedy this situation by multiplying the POR1 assessment rate by the total entered value of the applicable non-subject POR1 entries and then subtracting the result from the numerator of the assessment rate calculation.

Petitioners contend this issue is a repetition of the argument raised by Mexinox and addressed by the Department in the 1999-2000 Final Results and state they will not contest this argument in light of the Department's handling of the assessment rate issue in that review. Petitioners declare, however, that Torrington is wrong in its determination that merchandise entered by an affiliated importer and first sold to an unaffiliated customer outside the United States is not subject to the assessment of antidumping duties. While it is clear the Department cannot include such entries in determining the extent of dumping during the POR, petitioners assert, the CIT's determination that such consumption entries should forgo assessment "eviscerates Section 779's flat prohibition against drawback of antidumping duties, effectively limiting that prohibition to situations where the drawback claimant is unaffiliated with the exporter and initial importer." Petitioners' Rebuttal Brief at 1.

Department's Position: We agree with Mexinox in part. With respect to merchandise entered during the instant review period and first sold to unaffiliated parties outside the United States, we agree with Mexinox's suggestion that we should include the entered value of that merchandise in the denominator used to determine the assessment rate in order to facilitate the U.S. Customs Service's collection of antidumping duties on subject merchandise. See Torrington at 1039 (where there is no U.S. price for an entry which is subsequently re-exported, Commerce's decision not to impose antidumping duties on the entry is consistent with the basic purpose of the antidumping laws). However, we have limited the amount of the adjustment to sales made outside the United States during the instant review period, since our normal methodogy is to calculate assessment rates based on sales of subject merchandise made during the POR. Thus, we have not included in the amount of the adjustment those sales made outside the United States after the completion of the instant review period.

In keeping with <u>Torrington</u>, we agree with Mexinox that we should also make an adjustment to the assessment rate to account for subject merchandise that entered during POR1 but was first sold to unaffiliated parties outside the United States after the conclusion of POR1. We note it is irrelevant that these sales entered prior to the instant review period, since our normal methodology is to use sales made during the POR as a proxy for the assessment rate, <u>regardless of the date of entry</u>. However, we have limited the adjustment to sales made outside the United States during the instant review period (<u>i.e.</u>, we have <u>not</u> made an adjustment for sales made <u>after</u> the conclusion of the instant review period), and have added this amount to the denominator of the assessment rate.

<u>See</u> the Department's Final Analysis Memorandum, dated February 3, 2003, for further details regarding these adjustments to the assessment rate.

Margin Calculations

Comment 16: Treatment of Non-Dumped Sales

In the instant review, Mexinox states, the Department calculated the overall dumping margin by assigning a zero-percent dumping margin to U.S. sales made at or above home market prices (<u>i.e.</u>,

zeroing). Mexinox argues that by engaging in the practice of zeroing, the Department has violated its obligations under U.S. law. Citing Federal Mogul Corp. v. United States, 63 F. 3d 1572, 1581 (Fed. Cir. 1995), Viraj Forgings Ltd. v. United States, 206 F. Supp. 2d 1288, 1296 n. 14 (CIT 2002), and Fundicao Tupy S.A. v. United States, 652 F. Supp. 1538, 1543 (CIT 1987), Mexinox states it is a well-established principle that the Department must interpret and apply the U.S. dumping laws in a way that does not conflict with international obligations, including obligations under the WTO Antidumping Agreement. Mexinox asserts this principle is rooted in Alexander Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch.) 64, 118 (1804) (Charming Betsy), in which the Supreme Court declared that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Mexinox maintains the doctrine set forth by Charming Betsy is still in effect today.

Mexinox contends that nowhere does the antidumping statute direct the Department to assign a value of zero to negative dumping margins. Noting section 771(35)(A) of the Tariff Act defines "dumping margin" as "the amount by which normal value exceeds the export price or constructed export price of the subject merchandise," Mexinox holds this provision does not indicate only positive amounts should be considered. Quoting Black's Law Dictionary, Mexinox states the word "amount" is defined as "the whole effect, substance, quantity, import result or significance." Based on these definitions, Mexinox argues the "amount" of the dumping margin can be either negative or positive. Next, citing section 771(35)(B) of the Tariff Act, Mexinox states the term "weighted average dumping margin" is defined as the "percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." Mexinox maintains this provision does not instruct the Department to assign a value of zero to negative dumping margins prior to aggregating the margins for each exporter or producer. In fact, Mexinox argues, it is hard to fathom how "a true weighted average margin can be calculated without considering the actual dumping values in the numerator where the corresponding sales values are included in the denominator." Respondent's Case Brief at 11. By setting negative dumping margins to zero, Mexinox contends, the Department's methodology distorts the calculation of the aggregate dumping margin.

Mexinox asserts the Department's zeroing methodology appears to be based purely on administrative practice rather than on the statute. In the few instances in which zeroing has been upheld by the court, Mexinox contends the court has done so solely on the basis that the Department's practice "was a reasonable or permissible interpretation of U.S. law in the circumstances of the case." <u>Id.</u> (emphasis in original). For instance, Mexinox argues, in <u>Böwe Passat Reinigungs- und Washerietchnik GmbH v. United States</u>, 926 F. Supp. 1138, 1149-1150 (CIT 1996), the CIT reluctantly sustained the practice, stating it "introduces a statistical bias in the calculation of dumping margins." Mexinox holds the court has never found this practice to be required by the statute.

Mexinox maintains the Department's interpretation of the statute, to the extent it is reasonable, is generally given deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467

U.S. 837 (1984) (<u>Chevron</u>). However, Mexinox argues, when the Department's interpretation is inconsistent with U.S. international obligations, such deference is inappropriate. Mexinox refers to <u>Hyundai Electronics Co., Ltd. v. United States</u>, 53 F. Supp. 2d 1334 (CIT 1999) (<u>Hyundai Electronics</u>), in which the CIT contemplated a revocation standard promulgated by the Department that had recently been rejected by a WTO panel. While the CIT eventually found it was possible to reconcile the Department's revocation standard with the WTO <u>Antidumping Agreement</u>, Mexinox states the CIT stressed that <u>Chevron</u> and the <u>Charming Betsy</u> doctrine must be applied together when the latter is implied. Respondent's Case Brief at 12, citing <u>Hyundai Electronics</u> at 1344.

Mexinox claims the same legal principles and analysis must be applied in this case. Since the statute is silent with respect to zeroing and the Department has adopted this practice as an interpretation of the statute, Mexinox argues the relevant question is whether the Department's interpretation is compatible with the WTO Antidumping Agreement. Mexinox contends the WTO Appellate Body's decision in European Communities--Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R (March 1, 2001) (Bed Linen from India) shows zeroing is not compatible with the Antidumping Agreement. In Bed Linen from India, Mexinox states, the WTO Appellate Body upheld a prior finding that the European Communities (EC) had violated Article 2.4.2 of the Antidumping Agreement by treating negative price differences as zero when computing the aggregate dumping margin. According to Mexinox, in that case the WTO panel noted the Antidumping Agreement refers to dumping margins only in the context of the whole product. Mexinox contends that since the EC defined the product as "certain bed linens from India,' it was bound to calculate an aggregate dumping margin on the basis of that whole product group, not just the sub-group of sales that generated a positive dumping margin." Respondent's Case Brief at 13. Mexinox states the WTO Panel and Appellate Bodies also determined the EC's approach prevented a fair comparison of the export price and NV, because the WTO found that in zeroing negative margins "the EC had effectively manipulated the prices of the subject products to produce a higher dumping margin than they actually generated." Id. at 14. Mexinox argues it is irrelevant that the United States was not the appellee in Bed Linen from India. Furthermore, Mexinox asserts, it is also irrelevant that Bed Linen from India entailed an investigation rather than an administrative review because Article 2.4.2 of the Antidumping Agreement applies to administrative reviews by virtue of Article 9.3 of that agreement.

Since U.S. antidumping laws do not require zeroing, Mexinox argues, U.S. law does not conflict with the WTO <u>Antidumping Agreement</u>. Further, Mexinox claims, under <u>Charming Betsy</u> the U.S. antidumping statute must be interpreted in a way that is compatible with the WTO <u>Antidumping Agreement</u>. Mexinox therefore submits that any interpretation of U.S. antidumping law that permits zeroing is prohibited as a matter of U.S. law under the <u>Charming Betsy</u> doctrine.

Petitioners respond this issue reiterates the argument raised by Mexinox and addressed by the Department in the <u>1999-2000 Final Results</u>. Petitioners request that the Department reject this argument as it did in that review.

Department's Position: We disagree with Mexinox and have not changed our calculation of the weighted-average dumping margin as suggested by the respondent for these final results. As we have discussed in prior cases, our methodology is consistent with our statutory obligations under the Tariff Act. See, e.g., Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 67 FR 55780, (August 30, 2002), and the accompanying Issues and Decision Memorandum at Comment 3. Further, the CIT has upheld our methodology in The Timken Company v. United States and Koyo Seiko, Co., Ltd. and Koyo Corporation of U.S.A.; NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Bower Corporation and NTN Corporation; and NSK Ltd. and NSK Corp., Slip Op. 2002-106 (CIT 2002) (The Timken Company). As discussed below, we include U.S. sales that were not priced below NV in the calculation of the weighted-average margin as sales with no dumping margin. The value of such sales is included in the denominator of the weighted-average margin along with the value of dumped sales. We do not, however, allow U.S. sales that were not priced below NV to offset dumping margins found on other sales. The Tariff Act directs the Department to employ this methodology.

Section 771(35)(A) of the Tariff Act defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise" (emphasis added). Section 771(35)(B) defines "weighted-average dumping margin" as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." These sections, taken together, direct the Department to aggregate all individual dumping margins, each of which is determined by the amount by which NV value exceeds export price or CEP, and to divide this amount by the value of all sales. The directive to determine the "aggregate dumping margins" in section 771(35)(B) makes clear that the singular "dumping margin" in section 771(35)(A) applies on a comparison-specific level, and does not itself apply on an aggregate basis. The Tariff Act does not direct the Department to factor negative price differences (i.e., the amount by which export price or CEP exceeds NV) into the calculation of the weighted-average dumping margin. In other words, the value of "non-dumped" sales is not permitted to cancel out the dumping margins found on other sales.

This does not mean, however, that "non-dumped" sales are ignored in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any "non-dumped" merchandise examined during the POR: the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for "non-dumped" merchandise is included in the numerator. Thus, a greater amount of "non-dumped" merchandise results in a lower weighted-average margin.

Furthermore, this is a reasonable means of establishing estimated duty-deposit rates in investigations and assessing duties in reviews. The deposit rate we calculate for future entries must reflect the fact that the Customs Service is not in a position to know which entries of merchandise are dumped and which are not. By spreading the liability for dumped sales

across all reviewed sales, the weighted-average dumping margin allows the U.S. Customs Service to apply this rate to all merchandise subject to review.

Finally, with respect to respondent's WTO-specific arguments, we note that U.S. law, as implemented through the URAA, is fully consistent with our WTO obligations.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting the margin calculation accordingly. If these recommendations are accepted, we will publish the final results of the review and the final weighted-average dumping margin for Mexinox in the Federal Register.

AGREE	DISAGREE	
Faryar Shirzad		
Assistant Secretary		
for Import Administrat	ion	
Date		